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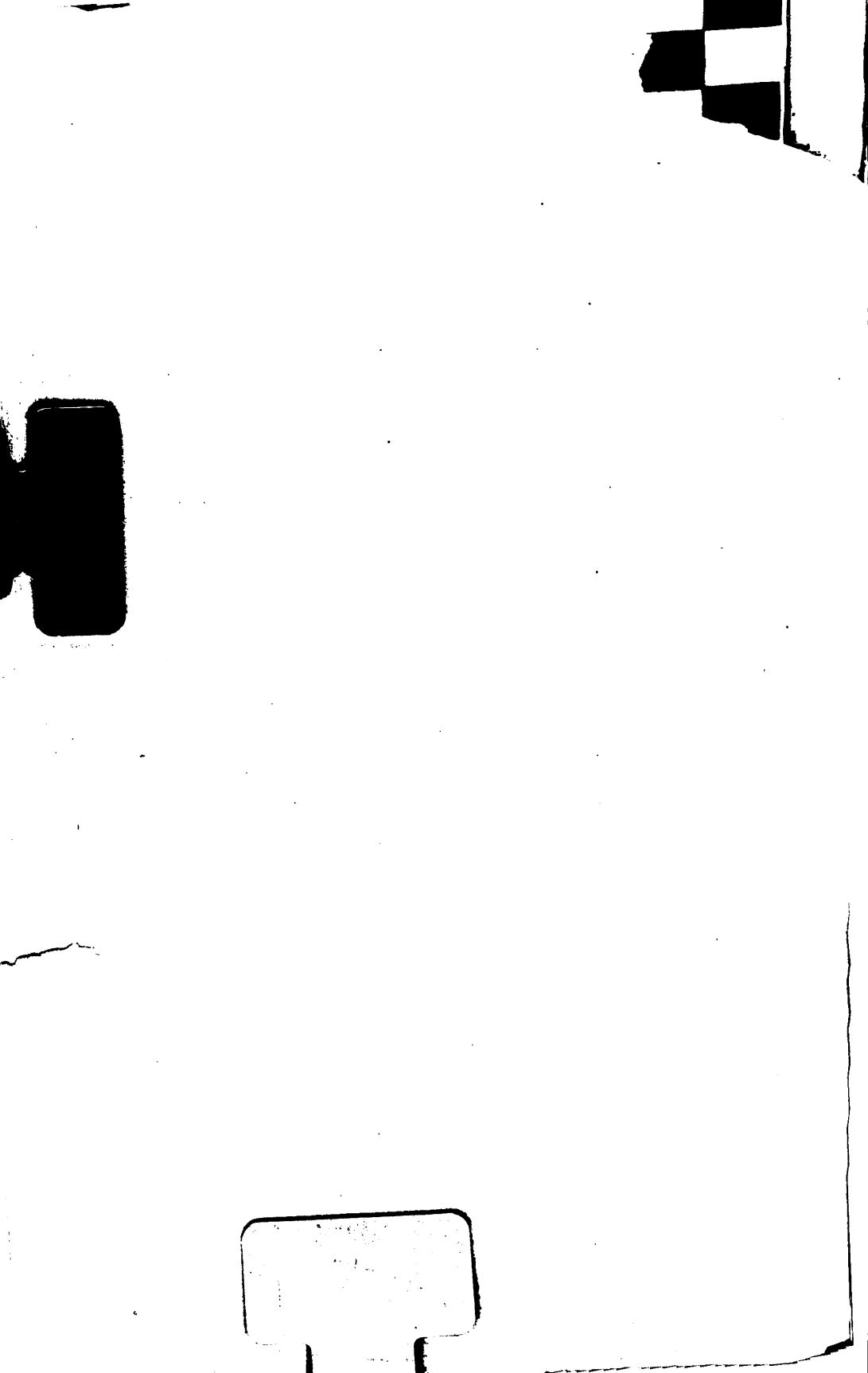
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PROCEEDINGS
OF THE
TWELFTH ANNUAL SESSION
OF THE
TEXAS BAR ASSOCIATION,
HELD IN THE
CITY OF GALVESTON, JULY 26 AND 27, 1893,
WITH THE
CONSTITUTION AND BY-LAWS,
ALSO
OFFICERS, STANDING COMMITTEES AND ROLL OF MEMBERS,
FOR THE YEAR 1893-'94.

AUSTIN:
PRINTED BY ORDER OF THE ASSOCIATION.
1893.

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These Proceedings are published by authority and distributed to members by the Association.

CHAS. S. MORSE, *Secretary*.

The thirteenth annual session of the Association will be held in the City of Galveston, on the last Wednesday in July, A. D. 1894.

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TEXAS BAR ASSOCIATION.

CONSTITUTION.

ARTICLE I.—NAME AND OBJECTS OF THE ASSOCIATION.

SECTION 1. This Association shall be called the TEXAS BAR ASSOCIATION.

SEC. 2. Its objects shall be to advance the science of jurisprudence, promote the uniformity of legislation in the administration of justice throughout the State, uphold the honor of the profession of the law, and encourage cordial intercourse among its members.

ARTICLE II.—MEMBERSHIP.

SECTION 1. Any attorney of the Texas bar, in honorable standing, upon his written application, may be admitted to membership at any regular meeting of the Association. Said application must be endorsed by three members of the Association, and a fee of \$5 shall accompany the same—\$2.50 initiation fee and \$2.50 annual dues.

SEC. 2. Such application shall be referred to the Board of Directors, who shall report the same to the Association, and, if said report be favorable, a ballot shall be taken, and if four-fifths of the members voting shall be in favor of the applicant he shall be declared elected.

ARTICLE III.—OFFICERS AND THEIR DUTIES.

SECTION 1. The officers of the Association shall be a President, a Vice-President, a Secretary and a Treasurer, who shall be chosen by ballot at a regular meeting, by a majority of the members present and voting.

SEC. 2. There shall be a Board of Directors, five in number, elected at the same time and in the same manner with the officers; and the President and Vice-President shall be ex-officio members of the Board.

SEC. 3. The officers and Directors shall hold their places for one year, and until their successors shall be elected; provided that the same person shall not be elected President two years in succession.

SEC. 4. The duties of officers shall be such as usually devolve upon such positions, and may be regulated and prescribed from time to time by the Constitution, By-Laws or resolutions of the Association.

CONSTITUTION OF THE

SEC. 5. The Board of Directors shall have exclusive authority, and shall exercise executive supervision over the affairs of the Association between its meetings.

SEC. 6. Vacancies in the offices and Board of Directors shall be filled by the Board, the concurrence of a majority of whom shall be necessary to a choice.

ARTICLE IV.—COMMITTEES.

SECTION 1. The following committees shall be appointed annually by the President for the year ensuing; and shall consist of five members each: On Jurisprudence and Law Reform; on Judicial Administration and Remedial Procedure; on Legal Education and Admission to the Bar; on Criminal Law and Criminal Procedure; on Commercial Law; on Publication; on Grievances and Discipline.

SEC. 2. A committee of three, of whom the Secretary shall always be one, shall be appointed by the President at each annual meeting of the Association, whose duty it shall be to report to the next meeting the names of all members who shall in the interval have died, with such notices of them as shall, in the discretion of the committee, be proper.

ARTICLE V.—GENERAL POWERS.

SECTION 1. This Association shall have power to impose fines, assess fees and establish by-laws for its government. It shall have power to remove officers and suspend or expel members for good cause, upon written charges exhibited against them by a member, and due notice given of the charges and of the time they will be brought before the Association.

SEC. 2. The By-Laws shall prescribe the assessment to be levied on the members for the support of the Association and the promotion of its objects.

ARTICLE VI.—QUORUM.

SECTION 1. Twenty-five members in regular standing shall constitute a quorum for the transaction of business.

ARTICLE VII.—ANNUAL ADDRESS.

SECTION 1. The President shall open each meeting of the Association with an address, in which he shall communicate the noteworthy changes in statutory and constitutional law, and especially such changes as affect the development and progress of the law and the administration of justice.

ARTICLE VIII.—MEETINGS.

SECTION 1. A majority of the members present at an annual meeting of this Association shall designate the time and place for holding the next annual meeting.

ARTICLE IX.—AMENDMENTS.

SECTION 1. All propositions to alter, amend or add to this Constitution

shall be made in writing at a meeting of the Association, and filed with the Secretary at least one month before being acted upon, and shall not be adopted without the concurrence of two-thirds of the members present.

ARTICLE X.—DUES.

SECTION. Each member of the Association shall pay to the Secretary the sum of \$2.50 as annual dues.

BY-LAWS.

ARTICLE I.—PRESIDING OFFICERS.

SECTION I. The President, and in his absence the Vice-President, shall preside at all meetings of the Association; if neither of these officers be present, a President pro tem. shall be chosen by and from the attending members.

ARTICLE II.—ADDRESS AND ESSAYS.

SECTION I. The Board of Directors, at its first meeting after each annual meeting, shall select some person to make an address at the next annual meeting, and not exceeding six persons to read papers.

ARTICLE III.—ANNUAL MEETINGS AND ORDER OF BUSINESS.

SECTION I. The order of exercises at the annual meeting shall be as follows:

1. Opening address of the President.
2. Nomination and election of members.
3. Report of the Board of Directors.
4. Election of the Board of Directors.
5. Reports of Secretary and Treasurer.
6. Reports of Standing Committees, as follows: On Jurisprudence and Law Reform; on Judicial Administration and Remedial Procedure; on Legal Education and Admission to the Bar; on Commercial Law; on Publication, on Grievances and Discipline.
7. Reports of special committees.
8. Nomination of officers.
9. Miscellaneous business.
10. The election of officers.
11. The annual address, to be delivered by the person selected by the Board of Directors, shall be made at the morning session of the second day of the annual meeting.

SEC. 2. This order of business may be changed at any meeting by a vote of a majority of the members present; and, except otherwise provided by the Constitution or By-Laws, the usual parliamentary rules and orders will govern the proceedings.

SEC. 3. No person shall speak more than ten minutes at a time, nor more than twice on the same subject.

SEC. 4. A stenographer shall be employed at each annual meeting.

SEC. 5. Each county bar association may annually appoint delegates, not exceeding three in number, to the next meeting of the Association, and such delegates shall be entitled to all the privileges of membership at and during said meeting.

SEC. 6. All papers read before the Association shall be lodged with the Secretary. The annual address of the President, the reports of the committees and proceedings of the annual meetings shall be printed, but no other address made or paper read or presented shall be printed except by order of the Committee on Publication.

SEC. 7. The Board of Directors shall, as soon as parties have been selected to deliver the annual address and read essays, notify the Secretary of this Association of such selections, and of any other matters of especial interest to be brought before the next annual meeting.

SEC. 8. The Secretary shall be and is hereby required to mail each member of the Association, ten days before each annual meeting, a written or printed notice of the time and place of such meeting, giving a statement of the addresses to be delivered, the papers to be read and other matters of especial interest, and shall also cause such notice to be published.

ARTICLE IV.—MEMBERSHIP AND DUES.

SECTION 1. The initiation fee to entitle a person to membership shall be five dollars, which shall include the annual dues for the first year.

SEC. 2. The annual dues shall be payable at the annual meeting in advance, and should any member neglect to pay them for any year at or before the next annual meeting, he shall cease to be a member. The Secretary shall give notice of this By-Law, within sixty days after each meeting, to all members in default.

ARTICLE V.—OFFICERS AND COMMITTEES.

SECTION 1. The terms of office of all officers elected at the annual meeting shall commence at adjournment thereof, except the Board of Directors, whose term of office shall commence immediately upon their election.

SEC. 2. The President shall appoint all committees, except the Committee on Publication, within thirty days after the annual meeting, and shall announce them to the Secretary, who shall promptly give notice to the persons appointed. The Committee on Publication shall be appointed on the first day of each meeting.

SEC. 3. The Secretary's and Treasurer's reports shall be examined and audited by the Board of Directors before their presentation to the Association.

SEC. 4. The Board of Directors and all standing committees shall meet on the day preceding each annual meeting, at the place where the same is to be held, at such hour as their respective chairmen shall appoint, and should any member of any committee be absent, the vacancy may be filled by the members of the committee present.

SEC. 5. The Committee on Publication shall meet within one month after each annual meeting at such time and place as the chairman shall appoint.

SEC. 6. Special meetings of any committee shall be held at such times and places as the chairman thereof may appoint; reasonable notice shall be given by him to each member by mail.

ARTICLE VI.—DUTIES OF COMMITTEES.

SECTION 1. It shall be the duty of the Committee on Jurisprudence and Law Reform to consider and report to the Association such amendments to the law as in its opinion should be adopted; also to scrutinize proposed changes in the law, and, when necessary, report upon the same.

SEC. 2. It shall be the duty of the Committee on Judicial Administration and Remedial Procedure to observe the practical working of the judicial system of the State, and recommend by written or printed report, from time to time, any changes therein which observation and experience may suggest.

SEC. 3. It shall be the duty of the Committee on Legal Education and Admission to the Bar to report the most suitable means for promoting and facilitating the study of the law, and the necessity or propriety of elevating the standard of qualifications for admission to the bar, and the best means for accomplishing that object.

SEC. 4. It shall be the duty of the Committee on Commercial Law to report the best means to produce uniformity in commercial law and usages.

SEC. 5. The Committee on Publication shall pass upon and have printed all papers, should they deem them of sufficient importance, except as it is otherwise provided by the Constitution and By-Laws.

SEC. 6. The Committee on Grievances and Discipline shall report as to the best means of upholding the honor and dignity of the law in the professional intercourse among the members of the Association. All complaints against any member of this Association shall be presented to this committee, and if the committee shall be of the opinion that the matters alleged are of sufficient importance, they will determine upon the course of procedure for the trial of the same; and shall give notice to the party charged of the nature of the complaint and the time of the trial thereof by

the Association; all of which the complainant shall also be notified by the committee.

ARTICLE VII.—RESOLUTIONS.

SECTION 1. No resolution complimentary to any officer or member, for any service performed, paper read or address delivered, shall be considered by this Association.

ARTICLE VIII.—AMENDMENTS.

SECTION 1. These By-Laws may be amended at any meeting of the Association, by a vote of two-thirds of those present; provided, that a copy of the proposed amendment shall have been filed with the Secretary on or before the first day of such annual meeting.

PROCEEDINGS
OF THE
TWELFTH ANNUAL SESSION
OF THE
TEXAS BAR ASSOCIATION,

HELD IN THE
CITY OF GALVESTON, JULY 26 AND 27, 1893.

FIRST DAY—MORNING SESSION.

GALVESTON, TEXAS, July 26th, 1893.

The Twelfth Annual Session of the Texas Bar Association was held in the city of Galveston, commencing Wednesday, July 26, 1893.

Hon. John N. Henderson, President of the Association, called the meeting to order, and, a quorum being present, the reading of the minutes of the last annual meeting was, on motion, dispensed with.

President Henderson then read his annual address. (See Appendix.)

The Board of Directors made the following report:

To Hon. John N. Henderson, President Texas Bar Association:

The Board of Directors have had under consideration the application for membership of Charles Crenshaw, of Sherman; Arthur C. Foster, of Haskell; J. M. Hall, of Cleburne; J. D. Harvey, of Hempstead; George D.

Neal, of Navasota, and H. Teichmueller, of La Grange, and beg to report favorably upon them and recommend that the applicants be elected to membership.

We also have examined the reports of the Secretary and Treasurer, and find them correct in every particular.

M. E. KLEBERG,
J. W. TERRY,
R. H. PHELPS.

The report was received and adopted, and the applicants duly and legally elected as members.

The Board also reported favorably on the application of J. S. Wheless, of Galveston, and he was elected.

The Secretary then read his report, as follows:

GALVESTON, TEXAS, July 26, 1893.

To the President, Board of Directors, and Members of the Texas Bar Association:

I herewith submit my twelfth annual report, as Secretary, for the year ending Saturday, July 22, 1893, which has been referred to and approved by the Board of Directors.

I have received from the following members, since my last annual report, the amounts opposite their names:

July 27, 1892—	
Edward F. Harris	\$ 5 00
M. E. Kleberg 1890-'91-'92	7 50
Seth Shepard '92	2 50
W. B. Denson '90-'91-'92	7 50
T. N. Waul '92	2 50
J. N. Henderson '92	2 50
John Tackaberry '92	2 50
N. G. Kittrell '92	2 50
S. C. Padelford '92	2 50
C. C. Garrett '92	2 50
P. C. H. Brotherton '92	2 50
John M. Furman '91-'92	5 00
R. H. Phelps '87-'88-'89-'90	10 00
Henry Cline '92	2 50
L. B. Davis '92	2 50
W. M. Giles '92	2 50
July 28, 1892—	
G. C. Groce	5 00

TEXAS BAR ASSOCIATION.

II

August 3, 1892—	
F. Chas. Hume	'92 2 50
Marshall Fulton	'87-'88-'89-'90-'91-'92 12 50
August 26, 1892—	
Joseph M. Dickson	'91-'92 5 00
September 20, 1892—	
F. C. Proctor	'92-'93 5 00
July 6, 1893—	
M. D. Herring	'93 2 50
July 9, 1893—	
W. P. McLean	'92-'93 5 00
July 10, 1893—	
T. S. Maxey	'90-'91-'92-'93 10 00
July 11, 1893—	
W. L. Prather	'91-'92-'93 7 50
N. A. Rector	'92 2 50
F. W. Ball	'92-'93 5 00
T. J. Brown	'92-'93 5 00
R. G. West	'90-'91-'92 7 50
Wm. Croft	'92-'93 5 00
M. J. Whitman	'92-'93 5 00
Jo Abbott	'90-'91-'92-'93 10 00
July 12, 1893—	
S. B. Maxey	'92-'93 5 00
A. P. McCormick	'92-'93 5 00
F. D. Minor	'92-'93 5 00
Sidney T. Fontaine	'91-'92-'93 7 50
T. W. Ford	'91-'92-'93 7 50
July 13, 1893—	
C. B. Kilgore	'87-'88-'89-'90-'91-'92-'93 17 50
Presley K. Ewing	'92-'93 5 00
Lewis R. Bryan	'92-'93 5 00
July 14, 1893—	
Jonathan Lane	'90-'91-'92-'93 10 00
John S. McCampbell	'91-'92-'93 7 50
J. B. Dibrell	'91-'92-'93 7 50
July 15, 1893—	
R. L. Ball	'92-'93 5 00
Isaac N. Dennis	'92-'93 5 00
July 16, 1893—	
B. D. Tarlton	'90-'91-'92-'93 10 00
W. S. Temple	'92-'93 5 00

July 17, 1893—		
S. R. Blake	'91-'92-'93	7 50
S. P. West	'91-'92-'93	7 50
July 18, 1893—		
W. C. Wear	'92-'93	5 00
July 19, 1893—		
A. Chesley	'91-'92-'93	7 50
A. G. Moseley	'90-'91-'92-'93	10 00
July 22, 1893—		
W. T. Hefley	'91-'92-'93	7 50
W. N. Shaw	'90-'91-'92-'93	10 00
John G. Winter	'87-'88-'89-'90-'91-'92-'93	17 50
Philip C. Tucker	'92-'93	5 00

The disbursements have been as follows:

For printing proceedings of last session, circulars, postage, ex- pressage, binding, stationery and Secretary's salary, as per vouchers examined and approved by the Board of Directors	\$358 00
The collection of dues to July 22, amount to	342 50

In obedience to a resolution adopted at the last meeting, requiring me to draw on all members who were five dollars and over in arrears for dues, and to report at this meeting the names of those members who refused to pay, I notified all members so in arrears, and requested them to remit the amount due on or before the 16th day of July, and sent each one a copy of the resolution above referred to, stating plainly the amount then due.

On July 17, I drew drafts on 182 members who had failed to remit their dues, and placed the drafts in the hands of James H. Raymond & Co. for collection. They have not reported the names of any who have paid, but have returned quite a large number which they are unable to collect for reasons given on the back of each draft. Many, in fact the majority of these drafts, are endorsed "Out of the city," "Gone to Chicago," "Will not return for several weeks," while but a small number are returned "Refused."

In view of all this, and as it is a well known fact that a great many of our members are absent from the State, I would suggest that I be allowed until our next meeting to push the collection of those drafts and to report the names of those members who refuse or fail to pay, as I do not believe that any member who has voluntarily joined this Association, would willingly refuse to pay his annual dues.

I have received the printed proceedings of a great many Bar Associations, and have sent copies of our proceedings to every one that I can hear of.

Very respectfully submitted,

CHAS. S. MORSE, Secretary.

The Treasurer made the following report, which was adopted:

To the President, Board of Directors, and Members of the Texas Bar Association:

GENTLEMEN:—As Treasurer of the Texas Bar Association, I have the honor to submit the following annual report:

My last annual report, shown on page 17 of the printed proceedings of the Association for the year 1892, which has been examined and approved, shows a balance in the treasury of \$256.91.

Since said report was made out I have paid out for the banquet for 1892, \$175.00, leaving a balance of \$81.59. To this must be added the collections reported to me by the Secretary, for which he holds my receipt of this date, amounting to \$342.50, making a total on hand at this date of 421.59, which is subject to the order of the Association.

Respectfully submitted,

WM. D. WILLIAMS, Treasurer.

The President called for reports of standing committees :

Mr. Herring, for the Committee on Jurisprudence and Law Reform, reported a majority of the committee present, and asked until the evening session to make their report, which was granted.

Mr. Kleberg, Chairman of the Board of Directors, asked the desire of the Association as to a banquet. On motion, it was resolved to have the banquet at 9 o'clock on Thursday night.

Mr. Hume presented an invitation from the Corinthian Club, tendering the courtesies of the Club to the members of the Association and inviting them to a sail on the bay.

On motion the invitation was accepted and the thanks of the Association returned to the Club.

Mr. Terry invited the members to the Garten Verein this afternoon, which invitation was accepted.

On motion the meeting adjourned until 4.30 p. m.

FIRST DAY—EVENING SESSION.

GALVESTON, July 26, 1893.

The meeting was called to order by President Henderson at 4:30 p. m.

The President notified the Association that he had appointed

as delegates to the American Bar Association, T. J. Brown, Seth Shepard and T. S. Maxey, in pursuance of the resolution so authorizing him, adopted at the last annual session.

Mr. Herring, a member of the Committee on Jurisprudence and Law Reform, read his individual report as a member of that committee, prefacing his remarks with the statement that the other two members of the committee present did not concur in the views expressed and had not signed the report.

Judge Brown spoke in opposition to the remarks contained in the paper read by Mr. Herring.

Mr. Scott moved to refer the paper back to the committee.

Mr. Ewing moved as a substitute, that the paper be filed, and considered merely as expressive of the views of an individual member of the committee.

Mr. Hume made the point of order, that the paper, as read by Mr. Herring, was not properly before the meeting, as it was not a report, and no action could therefore be taken upon it.

Mr. Kleberg was in favor of the paper as read being considered as a report of one member, and thought the same should be published.

Mr. Scott withdrew his motion.

Mr. Shepard read from the by-laws the rule governing papers read and their disposition, and raised the point of order that no motion could be had on the disposition of the paper.

Mr. Ewing withdrew his substitute, the President having sustained the point of order.

On motion, the regular order of business was suspended, and Mr. Scott read the paper prepared by him at the request of the Board of Directors. (See Appendix.)

The Board of Directors reported favorably on the application of W. S. Brooks, of Brazoria county, for membership. The report was adopted and Mr. Brooks duly elected a member of the Association.

Mr. Winter, of Waco, read a paper, prepared in response to the request of the Board of Directors. (See Appendix.)

On motion, the meeting adjourned until to-morrow morning at 9:30 o'clock.

SECOND DAY—MORNING SESSION.

GALVESTON, July 27, 1893.

The Texas Bar Association was called to order in the parlors of the Beach Hotel, at 9:30 a. m., by President Henderson.

On motion, the reading of the minutes of yesterday's session was dispensed with.

The Board of Directors reported favorably on the application of J. C. Crisp, Esq., of Beeville, and M. C. Granberry, of Austin, and they were elected to membership.

L. R. Bryan, Esq., offered the following resolution:

Be it Resolved by the Texas Bar Association—That in all cases in which the attorney for the plaintiff is to receive a contingent fee for his services of a part of the judgment or amount recovered, the attorney should be subject to the rule for costs as though he were a party to the suit,—and that the Legislature of Texas be requested to pass the necessary law or laws to carry the same into effect.

On motion to adopt, Mr. Williams called upon the author of the resolution to more fully explain it, and Mr. Bryan spoke to his resolution,—citing cases in point and showing a necessity for some such law.

Mr. Franklin spoke in favor of the resolution, while Mr. Crenshaw, of Sherman, spoke in opposition to its adoption.

Mr. Padelford thought there was an adequate remedy already provided by law to prevent such actions as were cited by the mover of the resolution.

Mr. Denson was opposed to the adoption of the resolution, giving his reasons therefor.

Mr. Davis was in favor of its adoption, citing instances where such a rule or law as that provided for by the resolution was necessary.

Mr. Cline thought the relief sought by the resolution would not be obtained by its adoption, and addressed the meeting at some length in support of his views.

T. J. Brown, Esq., of Sherman, spoke against the adoption of the resolution, as it sought to legalize a practice of doubtful propriety.

Mr. Bryan again spoke in favor of his resolution, which, however, he was willing to have changed or amended.

Mr. Shepard, of Dallas, addressed the meeting at length on the subject matter of the resolution, and moved to refer the resolution to the Committee on Judicial Administration and Remedial Procedure, for their consideration and report thereon at the next annual meeting.

The motion to refer was adopted.

The annual address of the Association was then delivered by Thos. H. Franklin, Esq., of San Antonio. (See Appendix.)

Hon. H. Teichmueller, of La Grange, then read a paper on "Homestead Law." (See Appendix.)

Hon. T. S. Reese, of Hempstead, read a well prepared paper on "Criminal Law." (See Appendix.)

Hon. Richard Morgan, of Dallas, read a paper on "Receivers." (See Appendix.)

The annual election of officers for the ensuing year was then had, resulting in the election of the following: S. C. Padelford, of Cleburne, President; Thos. H. Franklin, of San Antonio, Vice-President; Chas. S. Morse, of Austin, Secretary; Wm. D. Williams, of Fort Worth, Treasurer.

The following Board of Directors were elected: W. H. Clark, Dallas; James B. Stubbs, Galveston; Lewis R. Bryan, Velasco; Robt. G. Street, Galveston; Wm. L. Prather, Waco.

President Henderson then introduced and installed the President elect, Hon. S. C. Padelford, of Cleburne.

The following Committee on Publication was appointed: Seth Shepard, Dallas; R. H. Phelps, La Grange; Charles Crenshaw, Sherman; L. B. Davis, Cleburne; M. C. Granberry, Austin.

On time and place of meeting, Mr. Phelps nominated Galveston.

Mr. Crenshaw named Fort Worth.

Mr. Granberry named Austin.

Galveston was selected as the place, and the last Wednesday in July, 1894, as the time for holding the next meeting.

On motion of Mr. Cline, it was resolved, that those members who from any reason desired to resign from active membership, could do so upon payment of past dues to the Secretary.

A resolution was adopted instructing the Secretary to draw a draft upon all members over five dollars in arrears for dues.

On motion of Mr. Terry, the Association adjourned to meet again in the city of Galveston, on the last Wednesday in July, 1894.

TWELFTH ANNUAL BANQUET
OF THE
TEXAS BAR ASSOCIATION,
GIVEN AT THE
BEACH HOTEL, GALVESTON, TEXAS,
JULY 27, 1893.

Menu

Cream of Chicken a la Reine

Celery en Branches

Broiled Sea Trout, Maitre d'Hotel

Pommes Dauphines

SAUTERNE

Sliced Tomatoes

Queen Olives

Soft Shell Crabs

Sweet Potato Chips

Sauce Tartar

Tenderloin of Beef, Pique, Mushrooms

Asparagus Hollandaise

CLARET

Small Patties a la Roman

Spring Chicken, Maryland Style

French Peas

Fresh Shrimp en Mayonnaise

Sardines

CHAMPAGNE

Assorted Cake

Fruit

Nuts and Raisins

New York Ice Cream

Roquefort Cheese

Crackers

Cafe Noir

CIGARS

Toasts

The State Judiciary—

The Bulwark of Civil and Religious Freedom

RESPONSE By Associate Justice T. J. Brown

The Federal Judiciary—

A Co-ordinate Branch of the Government of the United States

RESPONSE By Judge Seth Shepard

The Bar—

. May it please Your Honor, I appear for the Defendant

RESPONSE By Judge John N. Henderson •

Stare Decisis—

The Beauty of the Law is its Certainty

RESPONSE By Lewis R. Bryan, Esq.

The Ladies—

“Now twilight lets her curtain down and pins it with a star”

RESPONSE By Presley K. Ewing, Esq.

OFFICERS AND COMMITTEES.

S. C. PADELFORD	<i>President</i>	Cleburne
THOS. H. FRANKLIN	<i>Vice-President</i>	San Antonio
CHAS. S. MORSE	<i>Secretary</i>	Austin
WM. D. WILLIAMS	<i>Treasurer</i>	Fort Worth

BOARD OF DIRECTORS.

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James B. Stubbs	Galveston
Lewis R. Bryan	Velasco
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Charles Crenshaw	Sherman

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[NOTE.—The President of the Association desires that the Chairman of each committee put himself in communication at once with each member of his committee, and that each committee begin without delay to prepare the material for a report. The selection of the committee has been made with the expectation and belief that each member of each committee will not only discharge the full measure of his duty in making a report, but that he will be personally present at the next annual meeting.]

ROLL OF MEMBERS.

Abbott, Jo....	Hillsboro	Coughanour, R. D.....	Dallas
Acker, Walter	Lampasas	Craig, K. R.....	Dallas
Alexander, L. C.....	Waco	Crain, W. H.....	Cuero
Allen, W. H.....	Terrell	Crawford, W. L.....	Dallas
Archer, Osceola	Austin	Crawford, M. L.....	Dallas
Atlee, E. A.....	Laredo	Crenshaw, Charles.....	Sherman
Aubrey, Wm.....	San Antonio	Crisp, J. C.....	Beeville
Austin, Wm. T.....	Galveston	Croft, William.....	Corsicana
Autry, James L.....	Corsicana	Culberson, Chas. A.....	Dallas
Avery, J. M.....	Dallas	Cunningham, J. D.....	Kaufman
Baker, Jas. A., Jr.....	Houston	Davidson, R. V.....	Galveston
Ball, Robt L.....	Colorado City	Davis, Geo. W.....	Dallas
Ball, F. W.....	Fort Worth	Davis, L. B.....	Cleburne
Ballinger, Thos. J.....	Galveston	Delany, W. S.....	Columbus
Beall, T. J.....	El Paso	Denson, W. B.....	Galveston
Bidwell, B. G.....	Weatherford	Dennis, Isaac N.....	Wharton
Blake, S. R.....	Bellville	Dibrell, J. B.....	Seguin
Blair, T. A.....	Waco	Dodd, Thomas W.....	Laredo
Blanding, J. M.....	Corsicana	Dowell, John.....	Austin
Botts, W. B.....	Houston	Douglass, W. L.....	Beaumont
Bower, E. G.....	Dallas	Drought, H. P.....	San Antonio
Brooks, W. S.....	Brazoria		
Brotherton, P. C. H.....	Galveston	Evans, Chas. I.....	Dallas
Brown, T. J.....	Sherman	Ewing, Presley K.....	Houston
Brown, W. M.....	Austin		
Brown, R. L.....	Austin	Farrar, L. J.....	Groesbeeck
Bryan, Lewis R.....	Velasco	Finlay, Geo. P.....	Galveston
Bryant, J. D.....	Richmond	Fisher, Sam R.....	Austin
Burges, W. H.....	Seguin	Flournoy, W. M.....	Waco
Burnett, James R.....	Palestine	Flood, W. W.....	Wichita Falls
Burts, Jas. H.....	Austin	Foard, R. L.....	Columbus
Callaghan, Bryan	San Antonio	Fontaine, Sidney T.....	Galveston
Campbell, A. R.....	Galveston	Ford, Pinckney S.....	Cameron
Carleton, Fred.....	Austin	Ford, T. W.....	Houston
Carrington, A. H.....	Wichita Falls	Foster, Arthur C.....	Haskell
Carr, J. S.....	San Antonio	Franklin, Thos. H.....	San Antonio
Carter, A. M.....	Fort Worth	Fulton, Marshall.....	Mason
Cate, M. H.....	Mineola	Fulmore, Z. T.....	Austin
Cavitt, W. R.....	Bryan	Furman, John M.....	Belton
Charlton, Wm.....	Dallas		
Chesley, A.....	Bellville	Gano, W. B.....	Dallas
Clark, George.....	Waco	Gardner, B. H.....	Fairfield
Clark, W. H.....	Dallas	Garrett, C. C.....	Brenham
Cline, Henry.....	Houston	Gibbs, B.....	Dallas
Coke, Henry C.....	Dallas	Giles, W. M.....	Mineola
Connor, T. H.....	Eastland	Gilbert, Joseph E.....	Greenville
Copeland, Jno. H.....	San Antonio	Goldthwaite, Geo.....	Houston
		Gould, R. S., Sr.....	Austin

Grace, Chas. D.	Bonham	Lovett, R. S.	Houston
Graham, A. H.	Austin	Looney, F. B.	Oakwoods
Grauberry, M. C.	Austin	Looscan, M.	Houston
Green, John A.	San Antonio	Lovejoy, John.	Galveston
Green, N. O.	San Antonio	Lumpkin, S. H.	Meridian
Greene, S. P.	Fort Worth		
Gresham, Walter.	Galveston	Martin, Thos. P.	Fort Worth
Grimes, S. F.	Cuero	Masterson, B. T.	Galveston
Groce, G. C.	Waxahachie	Mason, George.	Galveston
		Matlock, A. L.	Fort Worth
Hall, J. M.	Cleburne	Maxey, T. S.	Austin
Harris, A. J.	Belton	Maxey, S. B.	Paris
Harris, Edward F.	Galveston	Mayfield, C. H.	San Antonio
Harris, John Charles	Galveston	McCampbell, Jno. S.	Corpus Christi
Harvey, J. D.	Hempstead	McCormick, A. P.	Dallas
Harwood, T. M.	Gonzales	McCormick, George.	Columbus
Harwood, T. F.	Gonzales	McDonald, W. L.	Dallas
Hefley, W. T.	Cameron	McKie, W. J.	Corsicana
Henderson, John N.	Bryan	McKinnon, A. P.	Hillsboro
Henderson, T. S.	Cameron	McLean, W. P.	Mount Pleasant
Henry, John L.	Dallas	McLecary, J. H.	San Antonio
Herring, M. D.	Waco	McLemore, M. C.	Galveston
Hill, James E.	Livingston	McNeal, Thomas	Gonzales
Hill, R. J.	Austin	Miller, T. S.	Dallas
Hobby, Edwin	Houston	Minyard, W. M.	Dallas
Hogsett, J. Y.	Fort Worth	Minor, F. D.	Galveston
Holmes, H. M.	Mason	Moutrose, Thomas	Greenville
Houston, A. W.	San Antonio	Moore, Jno. M.	Fort Worth
Houston, Reagan	San Antonio	Moore, W. F.	Austin
Howard, Russell	Floresville	Morris, F. G.	Austin
Hume, F. Charles	Galveston	Morgan, Richard	Dallas
Hunter, Sam J.	Fort Worth	Moseley, A. G.	Denison
Hurt, J. M.	Dallas	Mott, M. F.	Galveston
Hutchings, R. M.	Galveston		
		Neal, George D.	Navasota
Jackson, A. M., Jr.	Austin	Newton, S. G.	San Antonio
Jennings, Hyde	Fort Worth		
Jerdone, W. M.	Galveston	O'Brien, Geo. W.	Beaumont
Johnson, W. M.	Centreville	Oliver, W. C.	Houston
Jones, S. W.	Galveston		
		Padelford, S. C.	Cleburne
Kelley, D. A.	Waco	Park, M. C. H.	Waco
Kilgore, C. B.	Wills Point	Paschal, Geo.	San Antonio
King, W. W.	San Antonio	Paschal, Thos. M.	Castroville
Kirven, O. C.	Fairfield	Patrick, A. T.	Houston
Kittrell, N. G.	Houston	Peareson, P. E.	Richmond
Kleberg, M. E.	Galveston	Perkins, E. B.	Greenville
Kleberg, Rudolph	Cuero	Perryman, Sam R.	Houston
Kone, Ed. R.	San Marcos	Phelps, R. H.	La Grange
		Plowman, Geo. H.	Dallas
Labatt, H. J.	Galveston	Pope, W. H.	Marshall
Lane, John	La Grange	Porter, R. L.	Greenville
League, W. T.	Lampasas	Potter, C. L.	Gainesville
Ledbetter, W. H.	La Grange	Prather, Wm. L.	Waco
Lessing, W. H.	Waco	Proctor, F. C.	Victoria
Levi, Leo N.	Galveston	Proctor, D. C.	Cuero
Lightfoot, H. W.	Paris		
Livermore, A. L.	Houston	Quinan, George	Wharton

Rainey, Anson	Waxahachie	Stout, J. F.	Corsicana
Randle, E. B.	Fort Worth	Street, Robt. G.	Galveston
Read, F. N.	Dallas	Stubbs, James B.	Galveston
Rector, John B.	Austin	Swain, W. J.	Henrietta
Rector, N. A.	Austin	Taliaferro, Sinclair	Houston
Reese, T. S.	Hempstead	Tarilton, B. D.	Hillsboro
Reaves, S. D.	Tyler	Taylor, L. N.	Runnels
Rice, John H.	Corsicana	Teichmueller, H.	La Grange
Roberts, O. M.	Austin	Temple, Wm. S.	San Antonio
Robson, W. S.	La Grange	Terrell, A. W.	Austin
Rogers, R. A.	Fort Worth	Terrell, J. O.	Terrell
Russell, L. B.	Comanche	Terry, J. W.	Galveston
Russell, T. J.	Beaumont	Tackaberry, John	Houston
Rugeley, R. D.	Montague	Tomkins, Arthur C.	Hempstead
Sampson, Alex.	Galveston	Thompson, Wells	Columbus
Sayers, J. D.	Bastrop	Tod, John G.	Houston
Sayles, John	Abilene	Todd, Geo. T.	Jefferson
Sayles, Henry	Abilene	Tucker, Philip C.	Galveston
Scott, B. R. A.	Galveston	Thomson, T. A.	Austin
Scott, J. Z. H.	Galveston	Terhune, E. W.	Greenville
Scott, D. H.	Paris	Tucker, Chas. Fred.	Dallas
Searcy, W. W.	Brenham	Upson, C.	San Antonio
Sebastian, W. P.	Cisco	Vernor, Henry E.	San Antonio
Sexton, Frank B.	Marshall	Walker, A. S.	Austin
Shaw, Gus	Clarksville	Walker, Jno. C.	Galveston
Shaw, W. N.	Houston	Walker, R. C.	Austin
Shelley, N. G.	Austin	Walthall, L. N.	San Antonio
Shepard, Seth	Dallas	Watts, A. T.	Dallas
Shropshire, E. L.	Comanche	Waul, T. N.	Galveston
Simkins, E. J.	Corsicana	Wear, W. C.	Hillsboro
Simkins, W. S.	Dallas	West, Robt. G.	Austin
Simpson, Isaac P.	San Antonio	Wheless, J. S.	Galveston
Sims, M. L.	Clarksville	White, John P.	Austin
Sinks, Ed. R.	Giddings	Whitehead, J. P. C.	Dallas
Smith, R. W.	Galveston	Whitman, M. J.	Rusk
Smith, T. S.	Hillsboro	Williams, Eugene	Waco
Spence, W.	Dallas	Williams, Wm. D.	Fort Worth
Spencer, F. M.	Galveston	Willie, A. H.	Galveston
Stayton, Jno. W.	Victoria	Winter, Jno. G.	Waco
Stayton, Robt. W.	Corpus Christi	Woods, J. S.	Kaufman
Stephens, Jno. H.	Vernon	Wynne, R. M.	Fort Worth
Storey, L. J.	Lockhart		

DECEASED MEMBERS.

ADAMS, Z. T., Kaufman. Died January 9, 1886.
ANDERSON, JAS. M., Waco. Died June 3, 1889.
ANDREWS, A. W., Terrell. Died February 15, 1887.
AUSTIN, WM J., Denton. Died September 7, 1888.
BASSETT, B. H., Dallas. Died July 15, 1893.
BLEDSOE, D. T., Cleburne. Died July 1, 1893.
BONNER, M. H., Tyler. Died November 25, 1883.
BALLINGER, W. P., Galveston. Died January 28, 1888.
BRADLEY, L. D., Fairfield. Died October 6, 1886.
BRADSHAW, C. J., La Grange. Died June 13, 1888.
CARRINGTON, W. A., Houston. Died July 14, 1892.
CLEVELAND, C. L., Galveston. Died—1892.
CROOM, J. L., Jr., Wharton. Died August 2, 1890.
DEVINE, THOS. J., San Antonio. Died March 16, 1890.
FRISBIE, W. H., Groesbeeck. Died Sept. 12, 1883.
GARRETT, N. P., Cameron. Died—188—
GIVENS, J. S., Corpus Christi. Died January 20, 1887.
GUINN, R. H., Rusk. Died January 18, 1888.
GOSLING, H. L., Castroville. Died February 21, 1885.
HAGGERTY, J. J., Bellville. Died April 7, 1893.
HANCOCK, JOHN, Austin. Died July 19, 1893.
HILL, GEO. L., Gainesville. Died July 25, 1887.
JACKSON, A. M., Austin. Died July 11, 1889.
JOHN, A. S., Beaumont. Died February 5, 1889.
JONES, C. ANSON, Houston. Died January 19, 1888.
KILGORE, S. B., Wills Point. Died December 10, 1891.
KENNARD, JNO. R., Anderson. Died October 24, 1884.
KIRK, LAFAYETTE, Brenham. Died July 29, 1893.
LANGUILLE, P. T., Galveston. Died October 14, 1882.
LOGUE, L. J., Columbus. Died May 15, 1884.
MANN, H. K., Galveston. Died December 14, 1888.
MASON, J. R., San Antonio. Died July 29, 1888.
MCCOY, JNO. C., Dallas. Died April 30, 1887.
MOORE, GEO. F., Austin. Died August 30, 1883.
NOBLE, S. P., Galveston. Died March 20, 1890.
OCHSE, J. E., San Antonio. Died September 24, 1888.
PECK, L. D., Fairfield. Died May 30, 1885.
PEELER, A. J., Austin. Died November 3, 1886.
PONTON, T. J., Gonzales. Died December 9, 1889.
PRENDERGAST, H. D., Austin. Died November 5, 1886.
READ, N. C., Corsicana. Died October 25, 1884.
ROBERTSON, JOHN W., Austin. Died June 30, 1892.
ROBERTSON, SAWNIE, Dallas. Died June 21, 1892.
RUCKER, W. T., Belton. Died August 10, 1885.
STEWART, JOE H., Austin. Died August 14, 1890.
SWEARINGEN, J. T., Brenham. Died August 14, 1890.
TEMPLETON, JOHN D., Fort Worth. Died April 24, 1893.
TIMMONS, B., La Grange. Died June 17, 1884.
WAELDER, JACOB, San Antonio. Died August 28, 1887.
WALKER, RICHARD S., Galveston. Died May 24, 1892.
WALLACE, W. R., Castroville. Died November 12, 1884.
WARD, F. H., San Antonio. Died January 28, 1889.
WEST, CHARLES S., Austin. Died October 23, 1885.
WILKES, F. D., Lampasas. Died November 21, 1886.
WILSON SAM A., Rusk. Died January 24, 1891.

[NOTE.—The Secretary requests all members to notify him promptly of the death of any member of the Association.

PRESIDENT'S ANNUAL ADDRESS

DELIVERED BEFORE THE

TEXAS BAR ASSOCIATION,

BY

JUDGE JOHN N. HENDERSON,

PRESIDENT OF THE ASSOCIATION.

Gentlemen of the Texas Bar Association:

In accordance with an honored custom, and our constitution on the subject, the duty has devolved upon me as President of the Association to present you an address, "Communicating the noteworthy changes in statutory and constitutional law, and especially such changes as effect the development and progress of the law and the administration of justice."

The Twenty-third Legislature, during rather a protracted session, passed a number of laws, making some changes in our system of procedure and enacting laws upon new questions of public interest. Passing over minor matters, it will be my endeavor to state only such changes as are of a more or less notable character. For convenience I will divide the subject into, first, changes or amendments of constitutional law; second, amendments and changes of our rules as to practice and procedure in the administration of law; third, changes and amendments of civil statutes, and new laws relating to civil subjects, some of these, however, involving criminal laws and penalties; fourth, changes and amendments of the criminal laws.

CHANGES OR AMENDMENTS OF CONSTITUTIONAL LAW.

The Twenty-third Legislature submitted to the people a constitutional amendment to be voted on at the next general election

by which it is proposed to so amend section 51, article 3, of the constitution so as to allow the legislature to make an appropriation for the support and maintenance of a home for the indigent and disabled Confederate soldiers and sailors who are, or may be, bona fide residents of the state of Texas, such appropriation not to exceed \$100,000. We have already such a home at Austin, and in view of the fact that since its organization it has had to depend, so far as state aid was concerned, upon doubtful constitutional measures for its support, it would seem but right and proper that such an obstacle should be cleared away, and that a great state should be accorded the privilege of doing justice with an open hand to the needy heroes of the lost cause, who are rapidly passing away.

THE ELECTION OF RAILROAD COMMISSIONERS.

The amendment to section 30, article 16, of the constitution, provides for the election of Railroad Commissioners by the people. It is provided, that of those first elected one shall serve for two years, one for four and one for six years; their terms to be decided by lot. Thereafter one commissioner shall be elected every two years and their terms of office shall be six years.

AMENDMENTS AND CHANGES OF OUR RULES AS TO PRACTICE AND PROCEDURE IN THE ADMINISTRATION OF LAW IN COURTS OF CIVIL APPEALS.

The legislature enlarged the number of civil appellate courts from three to five, and located the two new districts at Dallas and San Antonio. The constitutional amendment creating these courts and the act of the legislature organizing them and defining their jurisdiction was presented before this body at its last session, and it is therefore not required that I discuss the subject. The only change that need be referred to is that whenever the docket of one of these courts is overcrowded, the appellant and appellee agreeing, the chief justice of the court where the accumulation exists shall have the power to transfer any case or cases to any one of the other Courts of Civil Appeals, the docket of which is not too crowded. It occurs to me that to have made this provision effective, the authority to transfer should have been vested in the courts, regardless of any agreement of counsel.

EXCESSIVE JUDGMENTS—REMITTER.

Chapter 69 provides, that where a case is appealed to the Court of Civil Appeals and that court should be of opinion that the amount for which the judgment below was rendered is excessive,

and the case for that cause alone ought to be reversed, the party in whose favor the excessive judgment was rendered shall have the right to enter a remitter for the excessive sum, and the judgment will then be affirmed for the proper amount. In case no remitter is made the case will be reversed, but in a new trial below no allusion can be made to the action of the appellate court in the matter of excessive judgment.

CERTIFYING QUESTIONS OF LAW TO THE SUPREME COURT.

An act provides, that whenever in any case pending before the Court of Civil Appeals there should arise an issue of law which said court deems advisable to present to the Supreme Court for adjudication, it shall be the duty of the presiding judge of said court to certify the very question to be decided to the Supreme Court, and during the pendency of the decision by the Supreme Court, the cause in which the issue is raised shall be retained for final adjudication in accordance with the decision of the Supreme Court upon the issue submitted.

DEFENDANT REQUIRED TO FILE HIS ANSWER ON RETURN DAY.

Article 1263 of the Revised Statutes has been amended so that now a defendant is required to file his answer in the district and county courts on the second day of the term and before the call of the appearance docket on said day. This change was doubtless enacted in view of the decision of the Supreme Court in *Railway Company vs. Scott*,¹ 66 Tex. Rep., p. 566, which allowed the full appearance day in which to file an answer, and really in practice, postponed the call of the appearance docket to the next day after the so called appearance day.

CHANGE OF VENUE—GROUNDS OF RESISTANCE TO, ENLARGED.

Under Article 1272, Revised Civil Statutes, as it formerly was, the sole ground to resist a change of venue in a civil case was to successfully attack the credibility of the witnesses on whose affidavits a change of venue was sought. By the recent amendment the contestee can attack the means of knowledge of the witnesses, or the truth of the facts set out in the application can be put in issue. The former statute had been construed, in *Farley vs. Deslond*, 58 Texas, page 588, according to its obvious import, and hence the amendment, which had already been too long delayed.

SUITS BY NEXT FRIEND.

The legislature passed an act to authorize minors having no legal guardian to bring and maintain suits by next friend, and

such next friend is authorized to make compromises and to enter into agreed judgments, and in cases where the recovery does not exceed \$500 the next friend is authorized to receive the money or property on his executing a bond with approved security in double the value of the money or property. The form of such bond is provided, and appears adequate to protect the minor's interest, and the court retains jurisdiction of the funds so recovered. While heretofore there has been no legislation on the subject, the right to maintain suits by next friend has long been recognized by the courts. (See *Johnson vs. Taylor*, 43 Texas Rep., p. 121, and *Evansich vs. Railway Company*, 57 Texas, p. 126.)

But it has been held that a judgment in favor of a minor suing by next friend did not authorize the receipt of the amount recovered by such next friend, but same remained in custody of the court until some legally authorized person was entitled to receive it. (See *Railway Company vs. Hewitt*, 67 Texas, p. 473.) The only change noted in this regard is the right of the next friend to receive the amount recovered, not to exceed \$500, on his executing proper bond. Such an amount would hardly justify the expense of a guardian or administrator, and the effect of the statute will be to save costs and expense, where the amount recovered is small.

No reason appears why the act should not embrace guardians ad litem, representing minor defendants. Yet it is apprehended that a proper construction of the act does not include them. See Art. 1211, Revised Civil Statutes.

SUITS AGAINST NON-RESIDENTS.

An act was passed authorizing suits against non-resident defendants who claim an adverse estate or an interest therein, or who claim any lien or incumbrance on said property, for the purpose of determining such estate, interest, lien or incumbrance, and granting the title of said property or settling the lien or incumbrance thereon.

The act recites in the emergency clause that there is no law to obtain jurisdiction over non-residents in suits to quiet title and to remove cloud from title of real estate. The emergency predicate is, to say the least of it, rather doubtful.

OBJECTIONS TO DEPOSITIONS WHEN HEARD.

An amendment to Article 2235, Revised Civil Statutes, requires objections to the form and manner of taking depositions to be heard at the first term of the court after same have been returned, and not thereafter.

ADVERTISEMENT OF EXECUTION SALES OF REAL PROPERTY.

By an act of legislature, all judicial sales of realty are required to be advertised in some newspaper in the county where sold, for three consecutive weeks immediately preceding the sale, provided there is a newspaper in the county which will publish the advertisement at the rates fixed in the act. In the event there is no such newspaper, or the defendant in the execution notifies the clerk or justice issuing the writ that he does not desire the advertisement published, then the same will be posted as heretofore.

Such advertisement when published in a newspaper shall contain a statement of the authority by virtue of which the sale is made, the time of levy, and the time and place of sale, and shall state the locality of the property, giving a brief description thereof, sufficient for it to be reasonably known and identified. Obviously the intention of the legislature in requiring so brief a description of the land to be sold was to avoid the publication of the field notes so as to save costs. There will no doubt be some futile attempts at a reasonable description before the matter is finally settled in the higher courts as to what shall constitute a "brief description of the land, sufficient for it to be reasonably identified."

THE APPOINTMENT OF SPECIAL JUDGES IN COUNTY COURTS IN CIVIL AND PROBATE CASES.

The constitution of 1876, section 16, article 5, authorizes the transfer of any case in the county court which the county judge was disqualified to try to the district court of such county, and the legislature passed an act to the same effect. In 1891 the section and article of the constitution in question was amended, and provided, instead of the transfer of the cases from the county to the district court, for a selection of a judge by the parties, or in case they could not agree, then for the appointment of such special judge by the governor. The Twenty-third Legislature passed an act in accordance with said last named constitutional provision, and now in all civil cases in the county court where the county judge is disqualified to try, the parties may agree on a special judge, or if they cannot agree the governor is authorized to appoint a special judge. In probate matters, however, the act authorizes the governor to appoint a special judge on the mere certificate of his disqualification by the county judge, not requiring in such cases the certificate of the failure of the parties to select a special judge.

In view, however, of the clause of the constitution under which

the power is conferred on the governor to make the appointment of a special judge, which reads as follows, to-wit, "When the judge of the county court is disqualified in any case pending in the county court, the parties interested may, by consent, appoint a proper person to try said case, or, upon their failing to do so, a competent person may be appointed to try the same in the county where it is pending in such manner as may be prescribed by law," it may be seriously doubted whether the act in question confers jurisdiction on the governor in probate matters to appoint a special judge. The fact that estates are administered in a quasi ex parte, manner and that it would often be difficult to tell who were the parties who might or might not consent to the selection of a special judge, would not appear to obviate the difficulty.

APPOINTMENT OF SPECIAL JUDGES IN CRIMINAL CASES.

By a separate act it is provided that in criminal cases in the county court, where the county judge is disqualified, the parties interested may agree on a "proper person to try said case, and, if they fail to agree on or before the third day of the term, the county judge is required to certify such fact to the governor, who is authorized to appoint some practicing attorney to try said case."

TRADE MARKS.

An act was passed to protect trade marks on kegs, casks, boxes, bottles, etc., used in trade. To secure the protection of the act a fac simile of the trade mark or impression used on the keg, cask, box, bottle, etc., is to be filed by the party so using them in the county of the principal office, with the county clerk, and cause same to be published in a newspaper of said county for three consecutive weeks; and it is provided, that if any person shall thereafter infringe upon said trade mark, by using such trade mark or any such vessel, without the written consent of the proprietor of said trade mark, he shall be guilty of a misdemeanor and punished by fine.

This is commonly known as the "soda water" act, and manifests the inclination of the legislature to throw around this cold water industry the ægis of its protecting arm. It should be remembered, however, that it affords a fine auxiliary to Kentucky's favorite beverage.

ANTI-SCALPERS' ACT.

The act known in common parlance as the Anti-Scalpers' Bill restricts the sale of passenger tickets on all railroads in this State to the authorized agents of such roads. The tickets are required

to have printed on them that "it is a penal offense, for one not authorized, to barter, sell or transfer said ticket for a consideration," and if any person except the duly authorized agent of the company shall barter, sell or transfer such ticket for a consideration, he is guilty of a misdemeanor and liable to a fine.

The company is required to redeem all unused tickets from the original holder, and, on failure or refusal to do so, the railroad issuing same is liable to such holder in a sum not less than \$100 and not more than \$500, to be recovered in any court of competent jurisdiction.

FELLOW SERVANTS.

The law passed by the Twenty-Second Legislature defining who are and who are not fellow servants is amended by an act of the last legislature so as to make the provisions of the former law apply to receivers or persons in control of railways.

RAILROAD STOCKS AND BONDS.

The act regulating the issuance by railway companies of bonds limits the amount to be issued to an amount equal to the reasonable value of the road and its franchises; in exceptional cases, however, the Railroad Commission may authorize the issuance of additional bonds, not to exceed 50 per cent. of the reasonable value of the road.

The value of each railroad in the state is to be ascertained in the first instance by the Railroad Commission, and the issuance of bonds is predicated on such valuation. When a railroad desires to issue bonds, application is made to the commission, and if it shall appear that the road has complied with the law, the commission certifies its approval to the Secretary of State, who is required to register the said bonds in a book kept for that purpose, and he is required to endorse on said bonds under the seal of his office, "This bond is registered under the direction of the Railroad Commission of Texas," after which the bonds are ready to be negotiated. The act provides, where railroads are sold out, that all stocks and debts of every description shall be cancelled, and there shall be an issue of new stock in lieu of old stock, and the issue of the new stock and bonds in such cases is regulated by the act. The act also provides for the ascertainment of value of a road in progress of building, and authorizes the issuance of bonds under the act for the purpose of building and completing such roads. The act makes it a felony punished by confinement in the penitentiary for a term not less than two or more than fifteen years, for any railway official to knowingly make any false statement in order to procure the registration of said bonds; and

the act makes void any bonds issued by any railway company except as provided by the act, and also authorizes a forfeiture of the charter of any company which shall issue bonds unless in conformity with the act.

The act in question seems to be in accord with the State Constitution on the subject. See section 6, article 12, which provides "that no corporation shall issue stock or bonds, except for money paid, labor done, or property actually received, and all fictitious increase of stock or indebtedness shall be void."

The legislation on this subject, if made effective, will no doubt produce a radical change in railroad interests in this state, and the immediate effect may be to check and retard railroad building. It, however, places all railroad investments to be made in the future on a solid basis, and no doubt, when it is seen that such securities are adequately protected, it will ultimately redound to the advantage of the State.

CORPORATE OWNERSHIP OF LAND.

The act provides that no private corporation heretofore or hereafter created, whose main purpose of business is the acquisition or ownership of land by purchase, lease or otherwise, shall hereafter be permitted to acquire any land in this state; and such corporation now owning lands shall within fifteen years alienate same, and any land hereafter acquired by such corporation in payment of debts, which by the act they are allowed to do, is likewise to be alienated within fifteen years after such acquisition.

And the act further provides, that if any corporation shall acquire more land than is necessary to carry on its business, such excess is to be alienated in fifteen years, after the date of said act or after such acquisition. And no corporation is authorized to purchase more land than is necessary to carry on its particular business, provided they may take land to secure debts, but same is subject to the alienation clause. The act, however, does not apply to towns and cities, the legislature, doubtless, deeming that a corporation was as good as the ordinary denizen of such places and should have an equal showing.

Subsequent clauses of the act provide for escheat proceedings.

Any litigation under this act is so far in the future that it would be a waste of time to indulge in any discussion of its provisions. It has become a trite saying in physics "that it is easy to lead a horse to water, but much more difficult to make him drink," and it must be left to some future judge, as an equally knotty problem, to say that a corporation must sell its lands within the fifteen years, whether it can find a purchaser or not,

or otherwise they must be sacrificed to the state under escheat proceedings.

COUNTY AND MUNICIPAL BONDS.

Before any such bonds can be issued and negotiated, the copy of the order of the proper court authorizing their issuance and the order levying the tax to pay interest and provide a sinking fund, together with a statement of the indebtedness of the county, city, or town, as the case may be, and the assessed value for taxation, as shown by the last official assessment, with such other information as the Attorney-General shall request, is to be furnished to that officer. If the Attorney-General shall certify that such bonds as applied for can be legally issued, then the Comptroller is authorized to register said bonds. The bonds are then ready for negotiation, and are prima facie valid and binding obligations, the only defense allowed being that of forgery or fraud: Provided, that nothing in the act shall authorize an issue of bonds in excess of the constitutional limitation.

Such bonds cannot run longer than forty years, and cannot bear a rate of interest higher than six (6) per cent., and cannot be negotiated at less than their par face value; and at the time of the issuance of such bonds it is required that the county or municipality issuing same shall levy a sufficient tax to pay the interest and provide a sinking fund.

The act further makes it a felony punished by confinement in the penitentiary for a term not less than one and not more than five years for any mayor, county judge, tax assessor, or other person, to knowingly give a false certificate as to the indebtedness, the taxable values, or the rate of tax levied by the county, city, or town to provide interest or a sinking fund to pay said indebtedness, or if any such officer or person shall make a false statement as to any other fact required by the Attorney-General.

FINANCIAL LEDGER.

Article 935 of the Revised Civil Statutes is amended, and four additional articles are added thereto. The original article was general in its terms, requiring the county clerk to keep an account with all officers of the county receiving or collecting public money. It was without any stated compensation for the service, and no penalty was provided for a failure to discharge the duty. As a result there were but few counties in the state in which so important a book as the financial ledger was kept, and this was productive of much confusion and uncertainty in the accounts of county officers. By the amendment the county clerk is paid for the service and is required to keep a financial ledger

in which an account with each officer of the county collecting or receiving public money is required to be kept, and said clerk is required at each meeting of the commissioners' court to make a full statement of the county's financial condition. And it is furthermore made his duty immediately after the first meeting of the commissioners' court in each year to cause to be published (or posted if there is no newspaper) a full and correct statement of the county's financial condition. And if the clerk shall willfully fail, neglect, or refuse to keep said financial ledger, or shall willfully fail, neglect, or refuse to make, or cause to be made, the quarterly statement to the commissioners' court, he shall be punished by a fine not less than \$50 and not more than \$200.

There seems to be an omission in the act to provide any penalty for the failure to publish or post the annual statement required; yet this would appear to be equally as important as the making of the quarterly statement to the court.

LIVE STOCK SANITARY COMMISSION.

Chapter 56 establishes a Live Stock Sanitary commission to consist of three members appointed by the governor and confirmed by the senate. They are to receive \$5 a day each and expenses while engaged in the discharge of their duties. The Commission is authorized to establish rules and regulations to protect stock against infectious or contagious diseases, to indicate quarantine lines within the state (which are to be proclaimed by the governor,) and to co-operate with the national authorities in matters of quarantine; and said commission is given general supervision of live stock interests in the state.

Section 8 makes it a misdemeanor, punished by fine, for any person to knowingly bring into the state any domestic animal affected with or which has been exposed to any contagious or infectious disease.

Section 9 makes it a misdemeanor, punished by fine, for any person who has in his possession any such diseased stock who shall refuse to allow same to be inspected by said commission, or who shall obstruct or hinder said commissioners in an examination of such stock, or stock reported to be so diseased.

Section 10 makes it a misdemeanor, punished by fine, for anyone to knowingly permit any such diseased animal in his possession to run at large, or to keep same with other domestic animals not so affected, or who shall ship, drive, sell, trade, or give away any such animal, or who shall move or drive any domestic animal in violation of any rule established by the commission.

Section 13 makes it a misdemeanor, punished by fine, for any person to violate, etc., any of the provisions of the act, or who

shall violate or evade any of the rules established by the commission governing and regulating quarantine.

SALE OF REAL ESTATE BY FOREIGN EXECUTORS.

An act provides for the validation of sales of real estate heretofore made by foreign executors of wills which have not been probated here, provided the will gave the power to make such sales and was probated in another of the states prior to such sale.

ESTATES OF INSANE PERSONS.

Chapter 68 makes a change in the administration of community estates, the amendment being a provision to include an administration by the survivor of the common property where one of the spouses has become insane. Such administration to continue during the existence of the disability and to be conducted in the same manner as if the spouse was dead. Provided, on a restoration to sanity, there is a provision for a settlement and return of the estate.

RESCUE OF MINORS.

A law has been passed giving county judges jurisdiction to hear complaints of any citizen that a child under twelve years of age is being held in custody to its injury by other than its natural guardian. The complaint can be heard at a regular or called term, and the judge is authorized to award the custody of the child to a proper person.

DETECTIVES—THEIR EMPLOYMENT UNLAWFUL.

Chapter 104 makes it unlawful for any person, firm, or corporation to employ any armed force of detectives or other persons not residents of this state, and for a violation of the act the state is authorized to sue and recover before any court of competent jurisdiction a penalty of not less than \$25 nor more than \$1000.

PRIVATE CORPORATIONS.

Chapter 83, as amended, shows an enlargement of the purposes for which corporations can be created in this state, and is a manifestation of a more liberal spirit in that regard. It is not necessary here to enumerate the various purposes in which the law has been enlarged, but among other things it is gratifying to note that hereafter our wholesale merchants will not be compelled to resort to other states for a doubtful authority under which to do business in our own state.

CRIMINAL LAWS.

By an amendment to articles 747 and 748 of our Penal Code, the theft of hogs is made a felony regardless of value, and punished by confinement in the penitentiary not less than two nor more than four years; and the maximum punishment for theft of cattle is changed from five to four years. If the value of the sheep or goats stolen be \$20 or over it is a felony and punished by confinement in the penitentiary of not less than two and not more than four years; if the value of such sheep or goats be less than \$20, the punishment is by confinement in the county jail not exceeding six months, and by fine not exceeding \$250, or by such imprisonment without fine. Formerly the maximum imprisonment was a year and the maximum fine was \$500.

HUNTING AND FISHING ON ENCLOSED LANDS OF ANOTHER.

Hunting and fishing on the enclosed lands of another, without the consent of the owner, where the enclosure does not exceed 2000 acres, is prohibited by fine not less than \$25 and not more than \$100. In such case, however, before it is made an offense the enclosure must be posted as required by the act.

DECOYING MINORS FROM PARENT OR GUARDIAN.

Chapter 85 makes it a misdemeanor for any person to knowingly entice or decoy any minor from the custody of its parent or guardian or person standing in that relation. The punishment for such an offense is by a fine of not less than \$25 and not more than \$200.

INQUESTS.

The law as to holding inquests was amended so as to authorize the employment of a physician or chemist, when deemed necessary, and the commissioners' court is authorized to allow them not less than \$10, and not more than \$50.

BOARD OF PARDONS.

Chapter 74 creates a Board of Pardon Advisers. Said board to consist of two voters, to be appointed by the governor, and who shall perform such duties not inconsistent with the constitution with reference to pardons, as the governor may direct. Under the constitution the duties of such a board can only be to investigate applications for pardon, and to advise the governor with regard thereto.

LEGISLATION—SHIFTING JURISDICTION.

There are several other changes that might be considered material, such as the amendment to the "local option law," the regulation of the sale of spirituous liquors by retail, the public school act, and perhaps others, but the length of this paper and the necessity apparently imposed by our constitution of making a simple statement of the notable changes of our law made by statute—always dry and uninteresting—admonishes me that I have already well nigh exhausted your patience. I would, however, beg leave to make one further observation that occurs to me to involve a matter of importance to our profession. I allude to the frequent changes in jurisdiction between the district and county courts. The advantage of a shifting jurisdiction, such as we now have, is not manifest; it produces more or less confusion in the courts and with litigants, adding to the costs where transfers are made, and the expense of such legislation must of itself be a considerable tax on the people. The chief cause of this shifting of jurisdiction between the courts is no doubt attributable to the fact that county judges are not required to be lawyers. The constitution and the legislation thereunder requires "that they be well informed in the laws of the state."

In the selection of county judges by the people this has come to mean nothing, and in some counties if a lawyer aspires to the position of county judge, he finds himself very much handicapped in the race before the people. The result is, in a number of counties, men are elected as county judges who have no legal learning and very little experience in the courts, and yet these men are expected and required in the administration of the office to pass upon complicated and delicate questions of law and equity. In fact their jurisdiction over questions of law is almost if not quite as extensive as that of district judges. Where a man of no legal training is elected county judge, as a general rule his unfitness is soon recognized, and lawyers and people with one accord, in order to protect themselves and their rights in the courts of the country, are driven to apply to the first ensuing legislature to divest the county court of jurisdiction of all civil cases and vest the same in the district court. When, however, the next election comes around, and a competent county judge is elected, the jurisdiction is restored to the county court.

Unquestionably a remedy is required, and it is submitted that such remedy can be secured without a change of the constitution. The passage of a law by the legislature defining what is meant by the clause in the constitution "that the county judge shall be well informed in the laws of the state," and defining it to mean that each county judge shall be a lawyer of so many

years practice, or that he shall be a graduate of some law school, will accomplish all that is desired. Such action will render more accurate the rights of both person and property in these courts, and will place the administration of justice in these important tribunals upon a higher plane. To accomplish such a result the bar of the state and this Association should make their power and influence felt with the legislature.

In concluding this paper, I would observe that while the Twenty-third Legislature has been the recipient of much adverse criticism, yet I believe that the legislation it enacted was upon right lines, and the work it accomplished was for the benefit of the people; and on a calm review of its labors it will receive that meed of praise to which it is justly entitled; and among other things it will be commended for much that it did not do.

JUDICIAL CENTRALIZATION.

ANNUAL ADDRESS

DELIVERED BEFORE THE

TEXAS BAR ASSOCIATION,

BY

HON. THOMAS H. FRANKLIN,

OF THE SAN ANTONIO BAR.

Gentlemen of the Texas Bar Association:

When, after a continuous session extending over three months, the convention that framed our Federal Constitution adjourned, it is doubtful whether any member of it anticipated that the written instrument prepared for submission to the several states for their adoption as the bond of a more perfect union would ever be held anything else than what it plainly purported to be, a compact between sovereign states.

However, government is a growth, and a written constitution is the result and expression of the dominant public sentiment of the community adopting it, and, as public sentiment changes, and an advancing civilization or altered conditions of society demand either the enlargement or restriction of the powers of government expressed in the fundamental law, this will be accomplished either by amendments to the written instrument or by a forced and strained construction of its terms. Whilst the latter is the more usual method of effecting the change, it is the more dangerous, for it produces disrespect of the organic law, and distrust of its wisdom, and gradually undermines the restrictions and limitations it may have placed on the individual members of society and the different departments of government.

Where there is an open effort to amend the written organic law, the suggested amendments are publicly discussed, analysed

and considered, and a public sentiment favoring their adoption may be changed by argument before they can be adopted. The change that comes by construction, however, is usually the result of a public opinion then dominant, and the construction meets a public sentiment ready for its approval, whilst the opposition to the change can do no more than protest.

The character of the government of the United States necessarily depends on the construction to be given to the written constitution perfecting their union.

Three theories of construction of that instrument have contended for supremacy:

1. The sovereign states, acting through their respective delegates, met in convention and framed the constitution as a written compact to be entered into by the states as sovereigns, delegating certain specified powers to the agencies named in the instrument, and reserving all other rights to the respective states, or the people thereof, and that this compact was ratified by the states as sovereigns, and became the written evidence of the terms of the federation thus formed.

2. That the United States is a nation created by the people occupying the territory covered by the different states, and the constitution its written organic law, expressing directly or by implication the powers of the government.

3. That by the constitution, the states, as sovereigns, established a central government, to which they irrevocably delegated certain of their powers of sovereignty.

This third theory seems to have been adopted as a compromise between the other two, and is neither supported by reason nor sustained with logic. It admits that the constitution is a compact, but asserts that it is irrevocable, ignoring the fact that if the sovereignty of the states be admitted, they cannot irrevocably give to another government any of their sovereign rights, for this would be an agreement never to assert those rights, and would amount to the destruction of the states' sovereignty. Such an agreement could not be binding. Sovereign states cannot make a binding agreement to commit suicide. Again, if it be admitted that the constitution is a contract irrevocable by the parties to it, the result would be, as in a contract of marriage, the creation of a status, and this status would be the nation. So that the third theory really amounts to nothing, or it reaches the same result as the second, but from different premises and by other arguments.

In latter years a new canon of construction has been asserted: That in addition to the powers conferred by the constitution on the government by express words and clear implication, other

powers may be inferred from the character of the government, and as a necessary incident to the right of self-preservation existing in sovereignties.

The preamble to the constitution declares that "the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America."

By the further terms of the instrument, the declared objects of the government are to be accomplished by the instrumentalities and under the powers granted therein. If the powers are insufficient for the purposes in view, further grants of power can be made by three-fourths of the states concurring in amendments to the constitution; and if the powers are too broad, restrictions can be established in the same way.

It is obvious, therefore, that if the constitution is a compact between sovereignties, the powers granted are federal, and in ascertaining the extent of those powers they must be considered with reference to the federal character of the government; whilst, on the other hand, if the United States is a nation established by the people, and the constitution the organic law, these powers must be measured with regard to such national character. And it follows still further that the extent of the implied powers of the government will very largely depend upon its character as a federation of nations.

All governments must be established with a view to guard against two great dangers: the open violence of a stronger outward force, and the insidious attacks of an internal vice.

"The two great natural and historical enemies of all republics are open violence and insidious corruption."—Miller, J., in *Ex Parte Yarbrough*, 110 U. S.

Our constitution was evidently intended to protect against both of these dangers. Against the first, by giving to the government of the United States exclusive power to protect the union from any foreign foe; and against the second, by leaving to the states exclusive control over their domestic affairs. Any restrictions of the power to guard against the one, weakens our capacity to defend against an open enemy; any curtailment of the control of the states over their domestic concerns, increases the danger from the other.

There was, however, a third purpose to be accomplished by our constitution. It was to confer on the government of the United States control, sometimes exclusive of, sometimes concurrent with the states, over those subjects of government which, if left

entirely under the control of the states, would result in friction between them and defeat the very purposes for which the union was formed.

The powers conferred on the government and those reserved by the states, could not, in the nature of things, be stipulated in detail, for from every express grant others arose by necessary implication, and what powers should be implied depended not only on the words of the constitution, but also on the subject of the expressed power and the character of the government.

What this government was, under the constitution, and what powers it had thereunder, became, therefore, questions of construction of that instrument.

By the constitution, the judicial power of the government was vested in a Supreme Court and such other inferior courts as congress might establish, and the decrees of the Supreme Court were made final. Whilst this court has denied that it is a court of arbitration to settle disputed constitutional questions, practically it is, for, under its jurisdiction to hear and decide cases arising under the constitution and laws of the United States, and between citizens of different states, etc., every act of congress and the entire constitution can be reviewed and construed by it, and whilst theoretically the officers of the other departments of government are to construe the constitution as it is, practically they construe it as the Supreme Court declares it to be. Thus the power to decide what this government is under the constitution, and what powers it has thereunder, is lodged in the Supreme Court, and this department, designed to be the weakest of the three departments of government, is, in fact, the strongest in the extent of its power to centralize our government.

It is the purpose of this paper to briefly review the decisions of this court with a view of ascertaining how far, by construction, it has enlarged the powers of government and given to it the character and the essential attributes of a nation. I wish to say in advance, however, that I do not intend that anything I may say shall reflect on the integrity of that court. It is not only the highest judicial tribunal in the land, but it is a court without a scandal, and whilst its construction of our constitution may result in the final overthrow of republican government in this country, I have no doubt of the sincerity and the patriotism of the judges concurring in that construction. This is a government of law, and no lawyer should denounce and bring into disrepute the sacred tribunals in which our laws are administered, with no other ground for the denunciation than that there is a difference of opinion on a legal question between the court and its critics.

In ascertaining the extent of the powers of our government, the first question to settle is, whether it is a federation or a nation. If a nation, the constitution is to receive the most liberal construction, keeping always in view the character of the government it created. Its supremacy over the states in the exercise of the powers granted to it by the constitution must be supreme. Its power of self-protection must be absolute, for that is a necessity of its existence. Its implied powers must be limited only by the emphatic restrictions of its organic law. If a nation, the majority of the people composing it must have the right to alter its form and change its character, subject only to the right of the minority to resist such change by violence. This is the doctrine of force, not of right. By the terms of the constitution it can only be amended with the consent of three-fourths of the states, but, if the people established this government, they can change it and can adopt some other method than the one prescribed to effect that end. The majority in a republic need not follow any prescribed form in making a new organic law for their government. The right to effect such change is only limited by the capacity to accomplish it. Therefore, if the people created this government as a nation, what is to prevent them from assembling in convention, framing another constitution, and submitting it to a vote of the people? If it is adopted by a majority of the people, would it not be our constitution, and would it not become at once operative unless a minority of the people were stronger physically than the majority? Would such a constitutional convention be treasonable? Could such a body be dispersed by the strong arm of the executive branch of the government?

Our constitution gives the answer to these questions: "Treason against the United States shall consist only in levying war against *them*, or in adhering to *their* enemies, giving them aid and comfort." Const., Art. 3, Sec. 3.

According to the last census the voting population of the United States (including territories and the District of Columbia) numbered 16,940,311, and of these voters a clear majority, or 9,422,446, resided in eleven states of the union. These eleven states, therefore, have a sufficient voting strength to change our form of government. It is true that a combination of all the voters in these eleven states is very improbable, but in politics nothing is impossible. Population is now largely centering in the cities, and by reason of the difference in the business followed by rural and urban voters, there is a decided friction between them already, and, should this friction become extreme, and the cities have, if they have not now, a clear majority of

the voters of this country, whilst they may not be able to amend the constitution in the mode provided for its amendment, yet can they not do anything that the majority in a republican nation created by the people of such nation can do?

A few quotations from the decisions of our Supreme Court will show that it has fully and finally adopted the theory that the people, by our constitution, created a nation. What will be the decision of that tribunal if the majority of the people adopt a new constitution, and the court is called on to decide whether the old or the new is the supreme law of the land?

It is true that the sword has decided that a minority of the states cannot dissolve the union by withdrawing from it against the will of the majority, but the question now presented is an entirely different one. It is, cannot a majority of the people of a government, declared by its highest judicial body to be a nation, established by the people "to promote the general welfare, etc.," peaceably change that government, for like or other objects, by other modes than that provided in the instrument originally establishing such nation?

If the majority cannot constitutionally do this, the high tribunal holding this national theory, must, to be consistent, decide that the rights of the majority of the present generation to peaceably establish a government based on the consent of the governed was surrendered by their forefathers to the government of the United States, and can only be recovered through the consent of three-fourths of the states comprising the union.

Yet, if eleven states, having the majority of votes, desire no change in our constitution, the remaining three-fourths, having only a minority of votes, can, against the majority of voters, change by constitutional amendment the entire character of the government.

Let us now see how far the national theory has been adopted by our Supreme Court.

About a century ago one Chisholm brought suit against the state of Georgia, and the question arose in the case whether a sovereign state could be sued by a citizen of another state. To hold the affirmative of this proposition was to subject the states to the orders of the Supreme Court of the United States and practically to destroy their sovereignty. The jurisdiction of the Supreme Court was dependent not on the nature of the suit but the character of the parties, and to assert jurisdiction in the case before it, was to decide that the Supreme Court had jurisdiction in every suit against a state, of whatever character, brought by a citizen of another state.

If the court had the right to adjudicate the case before it,

then it had equally the right to enforce its decrees. How it proposed to do this, whether by levy of execution on the state's property, or by mandamus to its officers, or the modern method of appointing a receiver, it never had an opportunity to decide. It did not hesitate, however, to declare its jurisdiction, and in so doing Judge Wilson announced that there was one radical question before the court: "Do the people of the United States form a nation?" After propounding the question he promptly answered it in the affirmative. And in the same case, *Chisholm vs. Georgia*, Judge Jay said, "The people in their collective and national capacity established the present constitution. It is remarkable that in establishing it the people exercised their own rights and their own proper sovereignty, and conscious of the plentitude of it they declared with becoming dignity, 'We, the people of the United States, do ordain and establish this constitution.'" Here we see the people acting as "sovereigns of the whole country."

A constitutional amendment soon denied this jurisdiction to the court, but as late as 1821 Judge Marshall sought to explain away this amendment and assert that the Federal Court still had jurisdiction in a suit against a state by one of its own citizens if there was a federal question in the controversy. (*Cohens vs. Va.*, 6th Wheat.)

And Judge Miller in *United States vs. Lee*, 106 U. S., argues that exemption from suit by its citizens should not attach even to the government of the United States.

In *Martin vs. Hunters' Lessees*, Judge Story says, "The constitution of the United States was ordained and established not by the States, in their sovereign capacity, but emphatically, as the preamble of the constitution declares, by the People of the United States." And Judge Marshall, in *McCulloch vs. Md.*, 4th Wheat., says, "The people of all the states have created a general government. But when a state taxes the operations of the government of the United States, it acts upon institutions created, not by their own constitutions but by the people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves for the benefit of others in common with themselves. The difference is that which always exists and always must exist between the action of the whole on a part and the action of a part on the whole."

And in the same case he says further: "The government of the union, then, (whatever may be the influence of this fact on the case), is emphatically and truly a government of the people. In form and substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them and

for their benefit." And in the *Legal Tender* case Judge Strong uses this language, "The constitution was intended to frame a government as distinguished from a league or compact, a government supreme in some particulars over states and people." And Judge Bradley, in the said cases, speaks as follows: "The constitution of the United States established a government and not a league, compact or partnership. It was constituted by the people. It is called a government." . . . "As a government it was invested with all the attributes of sovereignty." . . . "The United States is not only a government, but it is a national government and the only national government in this country that has the character of nationality."

In *ex parte Yarbrough*, 110 U. S., Judge Miller, asserting the national character of our government, quotes with approval the following language of Chancellor Kent:

"The government of the United States was created by the free voice and the joint will of the people of America for their common defense and general welfare. Its powers apply to those great interests which relate to this country in its national capacity, and which depend for their protection on the consolidation of the union. It is clothed with the principal attributes of political sovereignty, and it is justly deemed the guardian of our best rights, the source of our highest civil and political duties, and the sure means of national greatness."

As far then as the Supreme Court of the United States can make it such by judicial construction, this government is a nation created and established by the people living at the time of its creation within the bounds of the territory covered by these states. This being established by the court, it must follow as a necessary deduction that the people who made the government can unmake and remake. Indeed Judge Marshall foresaw this result of his constitutional theories, and in *Cohens vs. Va.*, 6th Wheat, decided in 1821, said:

"It is very true that whenever hostility to the existing system shall become universal it will also be irresistible. The people made the constitution and the people can unmake it. It is a creature of their own will, and lives only by their will. But this supreme and irresistible power to make or unmake, resides only in the whole body of the people; not in any subdivision of them. *The attempt of any of the parts to exercise it is usurpation* and ought to be repelled by those to whom the people have delegated their power of repelling it. The acknowledged inability of the government then, to sustain itself against the public will, and by force or otherwise to control the whole nation, is no sound argument in support of its constitutional inability to preserve itself

against a section of the nation acting in opposition to the general will. . . . The framers of the constitution were, indeed, unable to make any provisions which should protect that instrument against the general combination of the states, or of the people for its destruction, and, conscious of this inability, they have not made the attempt."

Pomeroy, in his work on Constitutional Law, says: "Whatever was the political society that formed the constitution and government for itself, may change that constitution and government. This is a proposition self-evident. I need not repeat the reasons which have been already advanced to show that the one people of the United States—the nation—is the sole author of this scheme of organization, But our nationality does not need to be supported by arguments so apparently technical. It rests secure on the broad ground that one people made, and they alone can unmake; that they reared the original structure and have full power to enlarge and extend it. The capacities residing in them are boundless; their will, under God, is supreme; constitutions and governments are their instruments and servants, not their masters."

It is true that it is contended that the people establishing this government irrevocably conveyed away their rights to change its character or powers, except by action through the forms prescribed in the constitution for its amendment. If this argument is true our ancestors not only alienated their inalienable rights, but likewise the rights of their posterity.

But it is said the right asserted is that of revolution. Can a majority, possessed of inalienable rights, only assert those rights by revolution, or in a particular form prescribed over one hundred years ago? If it be revolution for a majority to assert these rights, what is it for a minority to deny them? As a majority of the voters of the United States live in one-fourth of the states, the minority living in the other three-fourths has the power, under the national theory, to control the will of the majority. This gives to sovereignty of the soil a new meaning, and confers on dirt the right of suffrage.

The nationality of the government having been established by the Supreme Court, as a logical result, the powers of that government become almost unlimited. Seeing this result the advocates of the theory have endeavored to avoid it by declaring that whilst all the powers of the national government were delegated to it by the people, yet it has only such powers as are expressly or impliedly conferred by them in the constitution. This is the doctrine of state and national supremacy within their respective spheres.

"The general government, though limited as to its objects, is supreme with respect to those objects." Marshall, J., in *Cohen vs. Va.*, 6 Wheat.

"The design of the constitution was to establish a government competent to the direction and administration of the affairs of a great nation, and at the same time to work, by sufficient definite lines, the sphere of its operations. To this end it was needful only to make express grants of general powers, coupled with the further grant of such incidental and auxiliary powers as might be required for the exercise of the powers expressly granted. These powers are necessarily extensive. It has been found, indeed, in the practical administration of the government, that a very large part, if not the largest part of its functions have been performed in the exercise of powers thus implied." Chase, J., in *Hepburn vs. Griswold*, 8 Wallace, 613.

"The government of the United States can claim no powers which are not granted to it by the constitution; and the powers actually granted must be such as are expressly given, or given by necessary implication." Martin vs. Hunter's Lessees 1 Wheat.

"This instrument contains an enumeration of the powers expressly granted by the people to their government." Gibbons vs. Ogden, 9 Wheat.

"The people of the United States, resident within any state, are subject to two governments—one state, one national. The powers which one possesses the other does not. They were established for different purposes, and have separate jurisdictions. Together they make one whole, and furnish the people of the United States with a complete government, ample for the protection of all their rights at home and abroad." Waite, J., in *U. S. vs. Cruikshank*, 92 U. S., p. 550.

"The government thus established and defined is to some extent a government of the states in their political capacity. It is also for certain purposes a government of the people. Its powers are limited in number, but not in degree. Within the scope of the powers as enumerated and defined it is supreme and above the states; but beyond it has no existence."--Waite, J., *U. S. vs. Cruikshank*; *Supra*.

In *McCulloch vs. Maryland*, 4 Wheat., Judge Marshall says: "No political dreamer was ever wild enough to think of breaking down the lines which separate the states and compounding the American people into one common mass."

Having thus admitted that our government was, under the constitution, one of delegated and limited powers, the court at once proceeded, by judicial construction, to broaden every granted power and to imply powers not only from those spec-

ially granted, but from the subjects over which the government was given some authority.

In fact Judge Marshall, a sincere and earnest believer in the national character of the government and a powerful advocate of a strong central sovereignty, consistently endeavored, whilst on the bench, to make our constitution, by construction, what Hamilton wanted it to be and not what it really was.

In order to accomplish this purpose the court has extended its jurisdiction whenever opportunity presented, and the people have been powerless to correct its usurpations save by the slow and almost impracticable means of a constitutional amendment. In order to raise a federal question in the Dartmouth college case, and thus give it jurisdiction, the court held that the franchise given to a private corporation was a contract, that from it was implied an executory contract not to violate such grant, and that this obligation not to violate this contract, so implied, was one that could not be impaired by a state.

Thus the creature of government became stronger than its creator, and a corporate franchise, even though obtained by fraud, found protection in the court whose judges had sworn to "administer justice without respect to persons."

In the same line with this decision the court has found that the power to regulate commerce contains by implication a greater power, that commerce means intercourse, that people are commerce, that the means of carrying on commerce can be controlled by the United States government, and finally, that the government can establish such means by creating corporations to transport freight and passengers, and can give the corporations thus created the power of eminent domain to be exercised both in the states and territories.

"The power to regulate, that is to prescribe the rules by which commerce is to be governed," says Judge Marshall, in *Gibbons vs. Ogden*, 8 Wheat.

"The power to construct or to authorize individuals or corporations to construct national highways and bridges from state to state is essential to the *complete control* and regulation of interstate commerce. Without authority in congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce. This power was freely exercised, and much to the general satisfaction, in the creation of the vast system of railroads connecting the east with the Pacific, traversing states as well as territories, and employing the agency of state as well as of federal corporations."—*Cal. vs. Central, etc., Rwy., Co.*, 127, U. S.

"The United States may exercise the right of eminent domain,

even within the limits of the several states, for the purposes necessary to the execution of the powers granted to the general government by the constitution."—*Cherokee vs. Southern Kansas Railway*, 135, U. S.

And the franchises of corporations established by the general government can not be taxed by the states.—*Cal. vs. Rwy.*, 127 U. S., p. —

The telegraph is likewise an instrument of commerce, and the state can not tax interstate messages.—*Rotterman vs. W. U. Tel. Co.*, 127 U. S.

For a number of years it was held by the court that where congress had not acted on the subject of interstate commerce, the states could, provided they did not discriminate in favor of their own citizens, and that the power over such commerce was not exclusive in the federal government.

Judge Story thus emphatically expresses the rule in *Houston vs. Moore*, 6 Wheat., 48:

"A constitution containing a grant of powers, in many instances similar to those already existing in the state governments, and some of these being of vital importance also to state authority and state legislation, it is not to be admitted that a mere grant of power, in the affirmative term, to congress, does *per se* transfer an exclusive sovereignty in such subjects to the latter; on the contrary, a reasonable interpretation of that instrument necessarily leads to the conclusion that the powers so granted are never exclusive of similar powers existing in the states; except where the constitution has, in express terms given an exclusive power to congress, or the exercise of like power is prohibited to the states."

"The example of the first class is to be found in the exclusive legislation delegated to congress over places purchased by the consent of the legislatures of the state in which the same shall be, for forts, arsenals, dock yards, etc.; of the second class, the prohibition of a state to coin money or emit bills of credit; of the third class, as this court has already held, is the power to establish a uniform rule of naturalization, and the delgation of admiralty and maritime jurisdiction."

"In all other cases not falling within the classes already mentioned, it seems unquestionable that the states retain concurrent authority with congress, not only under the eleventh amendment of the constitution, but under the soundest principles of general reasoning. There is this reserve, however, that in cases of concurrent authority where the laws of the states and of the union are in direct and manifest collision on the same subject, those of the union being the supreme law of the land, are of para-

mount authority; and the state laws, so far, and so far only, as such incompatibility exists, must necessarily yield."

"Such are the general principles by which my judgment is guided in every investigation of constitutional points. They commend themselves by their intrinsic equity; and have been amply justified by the great men under whose guidance the constitution was framed, as well as by the practice of the government of the union. To desert them would be to deliver ourselves over to endless doubts and difficulties, and probably to hazard the existence of the constitution itself."

But subsequently the court did not hesitate to involve itself in such "endless doubts and difficulties" and we soon find in *Robbins vs. Shelby Taxing District*, the views of the court stated as follows:

"The constitution of the United States having given to congress the power to regulate commerce, not only with foreign nations, but among the several states, that power is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system or plan of regulation." "Another established doctrine of this court is that where the power of congress to regulate is exclusive the failure of congress to make express regulations, indicates its will that the subject shall be left free from any restrictions or impositions; and any regulation of the subjects by the state, except in matters of local concern only, as hereafter mentioned, is repugnant to such freedom."

This decision left, at least in the states, a right to exercise their police powers over the subjects of interstate commerce, but even this power seems to have been denied them by the decision in *Leissy vs. Hardin*, 135 U. S., where the exclusive power of the United States government over such commerce is declared and its protection is extended to the subjects of commerce so long as they remain *wrapped up*. The police power of the state, under that decision, does not extend over whiskey in a cask or beer in a keg, but springs into full force and vigor as soon as the liquor is drawn and bottled.

Through all these decisions two purposes run: to centralize the government and to increase the power of the court to accomplish that end. The *Dartmouth College* case created a federal question where there was none. Under it corporations sprang into existence in every state and carried their business into other states. Into these states they had no right of access save by the comity of the states. *Pembina, Con., etc., Co. vs. Penn.*, 125 U. S. Having entered the state through comity, they should be required to submit to the jurisdiction of its courts.

This did not suit them, and they sought to enforce their rights in the Federal Courts and to confer jurisdiction by asserting that they were citizens of the states in which they had been incorporated.

The Supreme Court of the United States held that they were not citizens of the state within the meaning of the constitution. The corporations persisted, however, and got from the court a holding that if their members were citizens they could use that citizenship to confer on the Federal Court jurisdiction. Still this was not enough, and the courts again accommodated the corporations by holding that they would conclusively presume that the members of a corporation were citizens of the state creating it. Thus, a corporate name is sufficient to confer jurisdiction. *Kan., etc., R'y Co., vs. Atchison, etc., R'y Co.*, 112 U. S.

Still another step forward was taken, and the states were denied the right to stipulate as a condition to a non-resident corporation's doing business within their borders that it must surrender its right to sue in the Federal Courts. *Baron vs. Burnside*, 121 U. S., 186. And a still further restriction was placed on the power of the state by the judicial declaration that where a corporation was created by congress or engaged in interstate commerce the states were powerless to keep it beyond their borders. *Patterson on Federal Power over Commerce*, p. 9 and note.

When we consider how easily corporations can be created under the laws of the different states and the various enterprises in which they are engaged, the dangers following from these decisions cannot be over-estimated. And when we consider further, that at a nod from any one of these corporations a Federal Court will put it in the hands of a receiver and make any interference by state authority with its management a contempt of court, republican government in the states seems far from safe. If every state in the union, save one, refused to grant a corporate franchise under any circumstances, yet that one state, aided by the Federal Court, could control through its corporations the commerce of the country. And in this connection it must be remembered that where corporations are engaged in interstate commerce or hold their franchises from the United States, they can resort to the Federal Courts for protection against alleged infringements of their rights, and that in the execution of the decrees of those courts United States marshals and their deputies can do no wrong for which they can be subjected to arrest by the state authorities. In *re. Nagle*, 135 U. S. And the Federal Courts even protect these gentlemen in their use of the English language and assert jurisdiction to try actions against them for slander where the slanderous words are used by them in the dis-

charge of their official duties. *Buttner vs. Miller*, 1st Woods, 620.

Having declared the government a nation formed by the people, it was a logical deduction from the premises that there was inherent in it every power of sovereignty, not denied it by the constitution, and this deduction some of the judges of that court have unhesitatingly drawn.

With much hesitation, and as a war measure, justifying its act by the tremendous necessities of the times, congress authorized forced loans from the people of the country and declared the government's promises to repay these loans a legal tender for all debts, public and private. Its power to give to them the legal tender quality as far as private debts were concerned was questioned, and the Supreme Court, in a suit, was called upon to decide the question. In a carefully considered opinion the power was denied by that court. Subsequently this opinion was overruled by two opinions of the same court, Judge Bradley in one opinion thus stating the powers of our government:

"The constitution of the United States established a government and not a league, compact or partnership. It was constituted by the people. It is called a government. In the eighth section of article one it is declared that congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this constitution in the government of the United States or in any department or office thereof. *As a government it was invested with all the attributes of sovereignty.*

The United States is not only a government, but it is a national government, and the only government in this country that has the character of nationality. It is invested with power over all the foreign relations of the country, war, peace, and negotiations and intercourse with other nations; all of which are forbidden to the state governments. It has jurisdiction over all those general subjects of legislation and sovereignty, which affect the interests of the whole people equally and alike and which require uniformity of regulations and laws, such as the coinage, weights and measures, bankruptcies, the postal system, patent and copyright laws, the public lands and interstate commerce; all of which subjects are expressly or impliedly prohibited to the state governments. It has power to suppress insurrection, as well as to repel invasions, and to organize, arm, discipline and call into service the militia of the whole country. The president is charged with the duty and invested with the power to take care that the laws are faithfully executed. The judiciary has jurisdiction to decide controversies between the states, and be-

tween their respective citizens, as well as questions of national concern; and the government is clothed with power to guarantee to every state a republican form of government, and to protect each of them against invasion and domestic violence. For the purpose of carrying into effect and executing these and other powers conferred, and for providing for the common defense and general welfare, congress is further invested with the taxing power in all its forms, except that of laying duties on exports: with the power to borrow money on the national credit, to punish crimes against the laws of the United States and of nations, to constitute courts and to make all laws necessary and proper for carrying into execution the various powers vested in government or any department or officer thereof. Such being the character of the general movement, it seems to be a self-evident proposition that it is invested with all those inherent and implied powers which at the time of adopting the constitution, *were generally considered to belong to every government as such, and as being essential to the exercise of its functions.* If this proposition be not true, it certainly is true that the government of the United States has express authority in the clause last quoted, to make all *such laws (usually regarded as inherent or implied) as may be necessary and proper for carrying on the government as constituted, and vindicating its authority and existence.*"

If there could be any doubt as to the meaning of the majority of the Court in the legal tender cases, such doubt is destroyed by the notes to Judge Miller's lectures on the constitution prepared under his supervision, and by the dissenting opinions of Judges Chase, Field and Clifford:

"It is of little consequence, however, on which side the truth of this historical issue lies. The court of final resort has settled that this power exists in congress, not only as a special grant, but as a necessary adjunct to sovereignty." (Note to Judge Miller's lectures on the constitution.)

And the language of Judge Chase is: "It is unnecessary to say that we reject wholly the doctrine, advanced for the first time, we believe, in this Court, by the present majority, that the legislature has any powers under the constitution, which grow out of the aggregate of power conferred upon the government, or out of the sovereignty instituted by it." "If this proposition be admitted, and it be also admitted that the legislature is the sole judge of the necessity for the exercise of such powers, the government becomes practically absolute and unlimited."

No less emphatic are the words of Judge Field: "But beyond and above all the objections which I have stated to the decisions recognizing in congress a power to impart the legal tender quality

to the notes of the government, is my objection to the rule of construction adopted by the court to reach its conclusions, a rule which fully carried out would change the whole nature of our constitution and break down the barriers which separate a government of limited from one of unlimited powers." And the same judge, in the same case, says: "Congress can exercise no power by virtue of any supposed inherent sovereignty in the general government. Indeed, it may be doubted whether the power can be correctly said to appertain to sovereignty in any proper sense as an attribute of an independent political community. The power to commit violence, perpetrate injustice, take private property by force without compensation to the owner, and compel the receipt of promises to pay in place of money, may be exercised, as it often has been, by irresponsible authority, but it cannot be considered as belonging to a government founded upon law. But be that as it may, there is no such thing as a power of inherent sovereignty in the government of the United States. It is a government of delegated powers, supreme within its prescribed sphere, but powerless out of it."

And Judge Clifford thus expresses his views: "Delegated power ought never to be enlarged beyond the fair scope of its terms, and that rule is emphatically applicable in the construction of the constitution. Restriction at times may be inconvenient, or even embarrassing, but the power to remove the difficulty by amendment is vested in the people, and if they do not exercise it the presumption is that the inconvenience is a less evil than the mischief to be apprehended if the restriction should be removed and the power extended, or that the existing inconvenience is the least of the two evils, and it should never be forgotten that the government ordained and established by the constitution is a government of limited and enumerated powers, and that to depart from the true import and meaning of those powers is to establish a new constitution, or to do for the people what they have not chosen to do for themselves, and to usurp the functions of a legislator and desert those of an expounder of the law."

And again Judge Field says: "That the advocates of the right of the government to make anything but gold and silver a legal tender find the authority in what is termed a 'resulting power from the general purposes of the government.'"

And again, he says: "The doctrine that where a power is not expressly forbidden it may be exercised, would change the whole character of our government. As I read the writings of the great commentators and the decisions of this court the true doctrine is the exact reverse, that if the power is not in terms granted and is not necessary and proper for the power thus granted it does not

exist. The position that congress possesses some undefined power to do anything which it may deem expedient, as a resulting power from the general purposes of the government, which is advanced in the opinion of the majority, would, of course, settle the question under consideration without difficulty, for it would end all controversy by changing our government from one of enumerated powers to one resting in the unrestrained will of congress."

The centralizing effect of these legal tender decisions are expressed with clearness and force by Clarkson N. Potter in his argument to the Court in *Knox vs. Lee*, 79 U. S. He says: "Let your Honors, by your judgment here, decide that congress, in the exercise of its great power to borrow money, regulate commerce, maintain armies and navies and the like, can adopt any measure it may think fit in order to carry out those powers, and, as it seems to me, the last barrier to consolidated government will be broken down, and this nation will be delivered over, bound, to an absolute congress, and instead of the limited and localized system of government established by our fathers, we shall have passed irretrievably into a consolidated, absolute, centralized government."

In order to protect their citizens from the oppression of such of the corporations as were engaged in a quasi public business, the legislatures of the states, exercising a power universally conceded to be in them, endeavored to control such corporations by law. By a solemn judicial declaration of the Supreme Court this power was conceded to be a legislative one. In the case of *Cherokee Nation vs. South Kan. R. R. Co.*, 135 U. S., it said: "The question is no longer an open one as to whether a railroad is a public highway, established primarily for the convenience of the people and to subserve public ends, and therefore subject to government control and regulation. It is because it is a public highway and subject to such control that the corporation by which it is constructed and by which it is to be maintained may be permitted, under legislative sanction, to appropriate private property for the purposes of a right of way, upon making just compensation to the owner, in the mode prescribed by law."

But the court soon recalled this admission, asserted that the power was judicial, not legislative, and made itself the guardian of the railroads and the supervisor of the state legislatures. *Chicago, etc., R'y vs. Minn.*, 134 U. S.

Having denied the truth of history and made this government a nation created by its people, the Supreme Court has been unable to restrain the logical deductions necessarily flowing from the premises thus established. It declared the national govern-

ment supreme only in the exercise of the powers expressly granted or necessarily implied, then supreme over all subjects referred directly to it by the constitution, then this supremacy was extended over subjects impliedly under its control, and finally absolute power was conceded to it over those matters demanding the attention of a sovereign, unless the exercise of such power was expressly denied by the constitution.

Thus our government has, by judicial construction, become one in which tyranny is made a constitutional right, and the impairment of the obligations of private contracts a governmental function.

Implied restrictions have been made to give way to implied powers, and express limitations emasculated by the alleged necessary attributes of sovereignty. Grants of power are drawn from amendments intended as constitutional inhibitions, and authority for national action is found in a preamble. And the written organic law which, by its terms, can only be amended by the express consent of three-fourths of the sovereign states comprising the union, is fundamentally changed by a series of essays on government written by a court.

That the construction of our constitution by the Supreme Court has strengthened this government against an outward force, I do not deny. But its founders also desired to guard it against an internal vice. This they sought to do by establishing the equality of the governed and localizing the control of many of the subjects of government. The one supreme danger to republics, because it destroys the equality of the governed, is the concentration of wealth in the hands of a few, and it is never a function of republican government to create wealth. This function, however, is conceded to our government by its Supreme Court, and in the constitutional declaration that the government was established to promote the general welfare, is found a purpose and a power in government to aid individuals in the acquisition of wealth. As this wealth comes from the government, its owners look to the government for its protection, and clamor for a strong central power for the defense of their rights of property. They appeal to our congress for its aid, and apply to our court for its assistance in this defense. Government has become a side partner in railroad enterprises, a promoter of telegraph lines, an assistant in manufacturing enterprises, and when these enterprises languish they appeal for further help to their silent partner. For fear their interests may be assailed, they station their guards at Washington, and have so far debauched our profession that its members accept fees to watch the interest of such clients before legislative bodies, and a calling generally con-

demned when termed "lobbying" has become respectable when called "watching a client's interests." The perfume of the rose is changed with its name.

Government has done more under the authority of the Supreme Court: it has made money. As a consequence it has to keep up the value of that money, and the aid of the treasury department is demanded whenever wild speculation has disturbed the financial market. It has also become a purchaser of silver bullion, and when it indicates its purpose to retire from the business one of the territorial subdivisions of the nation threatens revolution, and in the silver warehouse at Washington a new political party finds a precedent for its demands that the people of other sections be given warehouses by the government in which to store other products.

On the other hand labor, seeing what government has done for capital, feeling the oppression of concentrated wealth, has turned to government for assistance and asks it to build railroads, erect telegraph lines, make money and distribute it.

Thus the two great forces in our republic, educated by the Supreme Court to look to government as a central dominant power, capable of correcting all social ills, are both demanding an extension of governmental powers. Capital asking a strong government to protect what it already has and give it still greater power, and labor asking that the dreams of Bellamy be made substantial fabrics and substituted for the constitution of our fathers.

When this is done, the "rest is silence."

From our constitution our court has created a Frankenstein. Can it, will it, control its creature? It has fostered an internal vice. Can it protect us from the results of its decrees? It has taught the public to regard the creation of wealth as a governmental function; how long will it be before that will be considered as the sole function of government? As yet, restrained by reverence of the law, the people have only sought a correction of the evils resulting from national aid given to the accumulation of wealth by counter appeals to government to assist them in bettering their financial condition. To use a homely metaphor, they ask "the hair of the dog to cure its bite," or, in the words of a political platform, the government is asked to give a "national currency, safe, sound and flexible, issued by the general government, and provide efficient means of distribution direct to the people."

Can any one tell, however, how soon these demands will be changed to cries for a redistribution of the wealth already accumulated, through government aid, in the hands of the few? How

will a court which has held that the impairment of the obligations of a contract is a constitutional right, inherent in the nation, answer these cries? Will it hold that the power to destroy wealth is as fully implied in our government, from its constitution, as the power to create it? Is confiscation also one of the functions of the government necessarily implied from its character as a nation? Shall we, in the near future, follow in the footsteps of the Athenians and make ostracism one of our political institutions?

It is useless to seek to avoid consideration of these questions. They are following us to-day; they must be answered before to-morrow comes. We have no right to leave them to our children for settlement. It is too late to build storm cellars after the cyclone has passed and left desolation and destruction in its path. Furthermore, they are questions that the Supreme Court cannot put down at its bidding, and any attempt to do so may provoke serious disturbances.

That court once thought it could settle the slavery question by a decree, but only succeeded in promoting civil strife.

I can see no protection against the threatened dangers save in the great conservative element in this country, and a quick return to the teachings of its founders as far as we can under our changed conditions. It will not do, however, for us to dwell in the past and apply the reasoning of 1787 to the conditions of 1893, for judicial construction, like revolution, does not go backward, and to-day's theory may be to-morrow's fact, and we must recognize that the people of this country are so thoroughly educated by the Supreme Court into belief in the national theory, and so many rights have become vested under the extended powers construed to be in our government by the decisions of that court, that the nationality of the government is now a fact, and we must admit the convincing logic of events.

But conservatism can resist any further misinterpretation of our constitution and demand that if it is inadequate to meet present political conditions it shall be amended by the proper authorities. The line between the powers of the state and the national government is so blotted and blurred by the Supreme Court that no one can now tell its present location. Let us draw the line anew by amendment to our constitution. Or, if the "political dreamer" of whom Marshall spoke, is among us and proposes to break down all lines which separate the states and compound the American people into one common mass, let us hear from him, and if his dreams have become the will of the people, let them so declare.

In no body of citizens is conservatism and love of country

more deeply rooted than in our profession, and the duty of protecting our government as established by the constitution, falls more directly on us than on others, for we made that constitution. The majority of the body framing that instrument belonged to our profession, and a lawyer's hand penned those immortal lines of our Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal; that they are endowed by their creator with certain unalienable rights; that among these, are life, liberty and the pursuit of happiness. That to secure these rights governments are instituted among men deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends it is the right of the people to alter or abolish it."

With these glorious words still ringing in their ears our forefathers adopted their constitution, and let anathema rest on him who perverts its meaning or evades its restrictions. If changed conditions require its alteration let it be amended by those to whom the right of amendment belongs, but let no court do so.

Neither states nor people ever gave to any court such power, and its exercise is rank and unqualified usurpation. That constitution is the "golden metewand" by which the powers of government are to be measured, not an "elastic cord" to be stretched at will by judicial authority.

Obedience to it is the highest duty of an American citizen. "The only loyalty which I can admit," says a distinguished judge, "consists in obedience to the constitution and laws made in pursuance of it. It is only by obedience that affection and reverence can be shown to a superior having a right to command. So thought our great Master, when he said to his disciples: "If you love me, keep my commandments."

THE HOMESTEAD LAW.

A PAPER READ BEFORE THE

TEXAS BAR ASSOCIATION,

BY

HON. H. TEICHMUELLER,

OF THE LA GRANGE BAR,

(Judge 22d Jud. Dist.)

ITS MERITS.

Mr. President and Gentlemen of the Texas Bar Association:

Our homestead law needs no defense and no eulogy. Experience has verified all the merits its warmest friends have ever ascribed to it, and it enjoys solid and deserved popularity, which repels any wanton attack. Giving credit to Texas for the first homestead law, Judge Dillon speaks of it as "the great gift of that young republic to the world." Our sister states have cordially welcomed this typically American achievement as an irrevocable contribution to American jurisprudence. We should now jealously guard this precious treasure against the intrusion of any practices which tend to corrupt it and to defeat its salutary purposes. Sincere attachment to its vital principle and a just estimate of its true value rather than stifle should encourage rational criticism of some details of the law as now in operation. And it is peculiarly the office of the legal profession to resist, by candid and fearless criticism, all vicious tendencies of law.

Homestead exemptions are really neither more nor less than a limitation of the power of government to enforce civil obligations and liabilities. They are beneficent when reasonably moderate, but excessive exemptions operate mischievously.

Imprisonment for debt, which was the harsh manifestation of unrestricted governmental power, is repugnant to modern views.

Its abolishment, however, vindicates but an abstract theory, which remained lifeless and has proved of little practical value until the good it faintly foreshadows was actually attained by the homestead exemption. Freedom of the person without protection of the fruits of his labor confers no substantial benefit. An old maxim, "No property without a person," is equally true when reversed, "No person without property."

Our homestead law exempts from the invasion of creditors a sphere of activity the individual creates for himself, and with which his existence is inseparably blended. Here the law respects the dignity of independent manhood, shelters sacred homelife as the nursery of character, gives scope to the energies of man, and affords him an opportunity to recover from disaster and to regain solvency. Thus it serves as a powerful incentive to noble exertions, which excessive exemptions, however, tend to paralyze, for they encourage indolence, invite fraud and legalize dishonesty.

EXCESSIVE EXEMPTIONS.

Our constitution limits the rural homestead to 200 acres, and the urban homestead to lots not over the value of \$5000 at the time of their dedication to home purposes. To this may be added a place of business, without reference to its value. Subsequent improvements, increase of population and general industrial developments may enhance the value of a homestead indefinitely, but without forfeiting its immunity from legal liability. A few suggestions suffice to illustrate the grotesque anomalies resulting from this virtually unlimited exemption.

It organizes a semi-respectable class of persons, who live in comparative affluence, but who are, nevertheless, insolvent, or rich paupers. It stimulates utterly hopeless commercial and industrial enterprises, for it assures profit to every unscrupulous adventurer of courage, though he may conceive them in fraud and conduct them to ruin. Homesteads of inordinate value serve as hiding places of ill-gotten gains and losses may be unloaded upon duped creditors. This is certainly no idle vision. Lawyers need not be reminded how frequently unprincipled dealers court and actually plan bankruptcy as a legalized method of stealing a fortune. Honorable merchants know from painful experience how hard it is to compete with rivals who may never intend to pay more than 20 per cent. of their debts. Every success of such schemes produces numerous imitators and spreads, like tricky practices, more widely. A robust public opinion fortunately checks these evil tendencies to some extent. In spite

of the law, which virtually sanctions and offers a premium to dishonesty, a general appreciation of good faith as the life of commerce exercises a wholesome counter influence.

I do not belong the school of jurists who consider it the mission of law to correct and improve the morals of the people; but it should never obstruct moral progress, nor should it ever antagonize public opinion of right and wrong. Law forfeits the reverence of the people if they have to witness in their tribunals of justice frequent triumphs of unblushing trickery, and if they are forced to conclude that it lends its resistless power to support conduct which the common sense of mankind condemns as disreputable.

A money valuation as the basis of homestead exemption is the only effectual remedy I can conceive. It may, in some isolated instances, expose an unfortunate family to the danger of being driven from a luxurious residence to a home of more modest pretensions. But this cannot be an objection of grave importance. Its general beneficial effect would be to compel many persons, who now waste their energies by incessantly studying how to avoid the payment of their debts and how to maintain their condition execution proof, to devote their attention to pursuits more useful to themselves and to society.

MORTGAGES ON HOMESTEADS.

I am also unqualifiedly opposed to the constitutional provision which prohibits owners—husbands and wives freely concurring—from mortgaging their homesteads. Its advocates forcibly contend that husbands may render their innocent families homeless by reckless extravagance or hazardous speculations. They also point to the danger, if this restriction should be removed, of non-resident money lenders becoming the mortgagees and ultimately the owners of our homesteads. But, without underrating the force of these and kindred arguments, I do not concede that it is ever the legitimate province of law to protect us against ourselves, or to shield us from the consequences of our own improvidence.

All so called paternal legislation accomplishes some immediate good results, but these never compensate for the permanent evil it inflicts. This sort of perpetual guardianship over the people dwarfs their intellects and impairs their robust self-reliance. People cease to do whatever the government does for them, and whenever legal coercion encroaches upon their domain of self-government to that extent it deprives man of the opportunities nature provides for the development of all his faculties. This grand principle of self government distinguishes American from

European institutions, and maps out a new and a nobler type of civilization. It recognizes the inviolable right of men, as individuals to manage their own affairs, and trusts to their experience in the intricate relations of actual life, and to their growing sense of intelligent responsibility, as the most potent factors of real progress. It accepts as true the self-evident maxim that "the character of the social units determines the character of the social aggregate." Our principle that man possesses the "native right to life, liberty, and the pursuit of happiness," forever discards all the old world state crafts and subtle policies for the promotion of the so called "general welfare." General welfare results alone from the welfare of individuals, and this is best secured by employing the organized force of government solely for the perfect protection of the peace and order of society, and of individual freedom.

Practically, this unwarranted meddling with the property rights of our citizens has wrought incalculable harm to our young state. In our day, credit performs no less important social functions than money. This constitutional inhibition, therefore, which absolutely withdraws all homestead property from the domain of commercial activity, cripples the resources of our people and retards the normal economic development of our state.

In this connection a passing notice of a remarkable rule of law may be relevant. I allude to the statute which subordinates a valid mortgage on land, not the homestead, to the widow's right to an allowance in lieu of a homestead. Though a plain rule of law, it is certainly liable to entrap unsuspecting creditors.

The several features here briefly touched unmistakably tend to complicate our homestead law, to involve it in needless uncertainties, and to jeopardize the rights of creditors. They conspire to shake the confidence and to excite the distrust of people in other states with whom it is the interest of our people to do business. Elements of our homestead law we value most can only be preserved in their purity if we firmly oppose all abuses and corrupting influences.

PUBLIC OPINION.

Law is elastic, and ceaselessly adapts itself to the exigencies of ever varying social conditions in obedience to the dictates of advancing public opinion. Everybody helps, more or less, to mold this powerful public opinion, and in order to do this efficiently we must learn to respect without fearing it. We underrate the capacity and virtue of the people when we suppose them intolerant of honest discussion. No frank appeal to the common intelligence and common honesty of the people ever

is fruitless. Demagogues and political tricksters have made them somewhat cautious and distrustful, but they are able and willing to distinguish men of convictions and disinterested intentions from those not entitled to confidence.

A dispassionate view of our changed social conditions shows that the time has come, or is speedily approaching, when the people will insist upon some reforms of our homestead law, such as I have here intimated. Who is really interested in the perpetuation of the features of that law now disgracing it? All business men of integrity desire readily intelligible and reasonably moderate exemption laws. Our farmers, who, as a rule, are prosperous and pay their just debts, only demand protection of their frugal homes as a secure retreat for their families in case of adversity. Tenants and wage-laborers, now a numerous and growing class, derive no benefit from extravagant exemptions. Scheming sharpers and professional bankrupts only remain to defend these patent deformities which now sully the fair name of our state and prejudice the best interests of her people.

I have touched some of the most salient points of this subject, because I believe it entitled to the serious attention of our profession. If I may hope that my suggestions will lead to a general and more exhaustive consideration and discussion of this important subject, I feel confident of useful results.

CONCLUSION.

In conclusion I may assign an additional reason for selecting this topic. It is somewhat akin to, and may be considered one of, a group of multiplying problems and controversies which begin to organize two distinct and implacably antagonistic schools of thinkers in jurisprudence as well as politics.

Modern progress, great historical events, and our rapid material development, have in few decades wrought marvelous changes in our economic, social and political conditions, which now demand a readjustment of our thoughts on law and government. Evils attending our brilliant civilization, such as the great contrast of extreme wealth and poverty, labor troubles and an alarmingly restless spirit of reform, ripen the necessity of defining with exactness the rightful province of legal or political coercion, or the legitimate sphere of government and its limitation. A principle is needed, simple but comprehensive, which may command the permanent assent of public opinion, as the principles of religious freedom and of local self-government have done in the past.

We are now rapidly bringing upon ourselves the evils of over-government, of officialism, and of socialistic legislation, manifestly imperiling our institutions and typically American civiliza-

tion, which anchor in the legally protected freedom of the individual man. Written constitutions, easily changed by amendment and interpretation, afford no adequate protection against these currents unless a healthy and intelligent public opinion inspires and supports them. In this irresistibly approaching contest of ideas lawyers will naturally exercise an immense influence, and important duties and great responsibilities will devolve upon them. However they may differ, their mental discipline and habits of passionless investigation promise to temper heated discussions and to restrain hasty and extreme innovations.

These views incidentally expressed, though an apparent digression, have some application to my subject. A well guarded and honest homestead law tends to foster a safe and conservative class of people. But the law as it now is, licensing fraud and restricting the rightful dominion of owners over their property, subserves the evil tendencies of our time.

CRIMINAL LAW.

A PAPER READ BEFORE THE

TEXAS BAR ASSOCIATION,

BY

HON. T. S. REESE,

OF THE HEMPSTEAD BAR.

(Judge of the 23d Judicial District.)

Mr. President and Gentlemen of the Texas Bar Association:

In a recent work by a lawyer, judge and law-writer of great and deserved reputation, the statement is made, referring to the Texas Code of Criminal Procedure, that "it is spotted all over with the finger-marks of lawyers who make a living by defending criminals."

This statement challenges attention, and especially the attention of this body, and of the entire bar of the state.

Is the statement true, or, getting to the larger question behind it, have we such a code of criminal procedure as serves satisfactorily the purposes for which such a body of law is intended?

When this question is considered with a view to finding an answer to it, there must also be considered the body of law to be found in our Criminal Reports, defining, construing and applying the provisions of the code, which are as much a part thereof as though they were legislative enactments. For a proper consideration of this question the most essential requisite is a clear and definite idea of the functions of a code of procedure.

The proper office and function of a code of criminal procedure is to provide the means of practically applying the abstract principles of the criminal law as embodied in the penal code to the concrete facts of each case as it arises.

The prime requisites of such a code are clearness and simplic-

ity, and there should be no unnecessary obstructions in the way of bringing the concrete crime and its abstract penalty into prompt and exact juxtaposition.

Clearness of expression and simplicity of plan and of detail depend upon a clear and definite knowledge of the matter under consideration; and, as knowledge of such matter becomes broader, clearer and more exact, greater clearness becomes possible.

And so, also, as in a progressive civilization social conditions, customs and habits of thought change, obstructions in the way of an ideally perfect application of the punishment to the crime, which were once either necessary or thought to be so, either become unnecessary, or are found to have been necessary, for the protection of the individual.

Fetters upon the power of the government in dealing with persons accused of crime, and restraining conditions in remedial procedure, originally devised to protect the subject from the arbitrary exercise of despotic power, and necessary and proper for the preservation of the individual rights and liberty of the citizen, may, and in fact under entirely different conditions of society and government, must become unnecessary for such purpose, and must come to serve the purpose only of needlessly obstructing the administration of justice and the punishment of crime.

Denying the imputation that much of our Code of Criminal Procedure was made by criminal lawyers in the interest of their own business, we may still admit that the criticism of Judge Thompson, in his work on trials, referred to in the beginning of this paper, is, to some extent, justified.

In every system of criminal law, and particularly of that portion which deals with procedure, as in fact in every system of government or of law of any kind, two warring principles contend, and sometimes one and sometimes the other gets the ascendancy. One regards the rights of the individual man, and the other regards the rights of the organized body of men, combined in the social state and called society.

It would be interesting to trace political parties back to their original beginnings, and see how nearly they divide on this line, and how nearly all the issues upon which they divide can be traced back to one or the other of these principles.

Every step toward the formation of a system of criminal law is an encroachment upon the natural rights of the individual man. That the neighbors of A and B should interfere in their quarrel, and assume the right to punish the one for any act done by him towards the other, is, from one point of view, an unwarranted infringement of his rights, and an unauthorized intermeddling with his individual liberty.

Racial characteristics, with circumstances of environment, determine the trend of national thought and action in the domain of politics and law, as regards these opposing ideas. It is hardly to be wondered at that Texas, in adopting a code of criminal procedure, should have gone to the extreme in jealously guarding the rights of the individual, and in providing safeguards against encroachment upon those rights. It is, in the first place, a distinctive trait of character of the Anglo-Saxon race which has been exemplified in every step of its history, to think largely of the individual man in his attitude toward society and government, and all the surroundings of every kind tend to intensify this trait and disposition in those of that race who moulded and formed the laws and institutions of Texas, and stamped the impress of this trait upon them.

The theory of our government, as well as the traditions of our race, have operated to foster and build up an extravagant regard for the rights of the individual as against the rights of organized society, as exhibited in the various provisions of the federal and state constitutions, in restraint of the power of the government in dealing with persons accused of crime; and if the criticism of our Code of Criminal Procedure is just, it applies as well, in some measure, to these constitutional provisions.

Another cause has operated to produce in our Code of Criminal Procedure the characteristics referred to. Our race on this continent has never gotten rid entirely of the idea that in the administration and execution of the criminal laws the government represents a force outside of and hostile to the individual or the aggregation of individuals. This idea or feeling has its origin in a time of our history when, as a matter of fact, government was a force outside of the people, if not hostile to them; when kings ruled under a claim of divine right, and were the source of all power, both in making and executing the laws, the individual citizen holding every right at the will of the sovereign.

Emerging from this state, by gradual processes, to the present state of self-government, the old jealousy of the power of the government, in some measure, like a superstitious fear of a graveyard at night, still abides in the minds of the people. On account of this feeling, many of the safeguards thrown around the individual have been perpetuated and retained to the present day, although they had their origin in a state of society and of government so different from our own that the necessity or the practical utility of their retention may well be doubted.

As in a state of barbarism, that is, in a natural state, the unit man is everything, and the organized aggregation of units called society nothing, so as we advance from such state and toward a

state of civilized society, the unit becomes of less, and the organized aggregation of units of more value. As our civilization becomes more complex and refined, necessarily the individual has to yield more and more of his rights in the interest of society and of the social aggregate. This process will necessarily continue as long as man advances in the arts and refinements of a continuously progressive civilization.

Whether the one or the other cause above referred to, or what cause soever is responsible for these defects in our Code of Criminal Procedure, it matters not. Do they exist, and are they remediable? It is bootless to fall back upon the old, wornout plea that these provisions represent the wisdom of our ancestors. There never has been an abuse in law or government that could not be sustained by the same argument.

There is no reason, in the nature of things, why there should not be growth, development, and improvement in law, as well as in every other branch of human knowledge, none of which is possible if any age or generation is to rest supinely upon the assumption that preceding ages or generations have said the last word that is to be said upon any branch of the law.

There is no reason why, in the law as in every other department of knowledge, any other question should be asked than, "In the light of what knowledge we have to-day, is it the best that can be done?"

Nor does it matter that many of these provisions have become imbedded in the organic law. Nothing is more hostile and antagonistic to the genius of our government and the institutions and traditions of our people, than that our generation, arrogating to itself the wisdom of the present and the past, and the future as well, should settle irrevocably any principle of law or government. We should try all things, and hold fast to that which is good until we find something we think better.

This does not mean that changes should be made, in the spirit of the iconoclast, to destroy an image because it is an image. On the contrary, changes should be made with the greatest caution, and a rule of doubtful soundness should be adhered to, unless it appears, with reasonable certainty, that more harm comes from its continuance than from its abolition. Frequent and inconsiderate changes in the law, in any branch of it, are in themselves, and in the very nature of things, harmful. But giving full weight to these arguments, that should not deter us from undertaking any reform which should appear to be necessary or useful.

We find then in our organic law and in our code of criminal procedure certain provisions which fetter the free movements of

this force which is seeking to convict and to punish the person charged with crime. There can be but one justification of these restraining provisions, that is that they are necessary to prevent the possible or probable conviction of some one charged with the commission of crime, but unjustly, and to insure a fair and impartial trial to the accused, to the end that no innocent man be punished, as far as that may be done.

An advocate of any one of these provisions should be prepared to answer these questions: Does it serve the purpose above stated? Is it necessary for that purpose? And, if both of these questions are answered affirmatively, does more harm or good result to society by reason thereof? This last question is not to be ignored, for a provision of law may serve the purpose of the prevention of punishment of innocent persons, and yet, by reason of the large protection it affords to the guilty as well, society may take so much more hurt than benefit therefrom, that it ought not to be retained. This doctrine will not pass without vigorous contest I know, for it is contrary to the teachings of that hoary, time-worn sentiment that it is better that ninety and nine guilty go free than that one innocent man be punished.

This is a favorite weapon in the armory of the criminal lawyer. How often have we seen it used to frighten the souls of timid jurors and to snatch a desperate criminal from the jaws of conviction; and yet it is not in any sense unqualifiedly true, and, in the sense it is so often used, not true at all.

In the domain of law there is a proneness to accept things as they are, a conservatism and aversion to change, a reverence for the *status quo*, which refuses utterly to judge anything with the flavor of age about it, by the principles of plain common sense. If an arbitrary provision of law or procedure can be traced back to *Magna Charta*, to doubt its wisdom and its applicability to all places and all times, is a kind of impiety. If we could get Fiddlefrigge or Ethelwolf to stand sponsor for it, to attack it would be high treason.

It must be granted that when any provision of law has become, as it is said, a rule of property, when extensive and long-standing property rights have grown up around it, although proven to be wrong in principle, less harm results from its continuance than from its disturbance; but there is no room for the application of this principle as ground of objection to changing any rule of criminal procedure and practice when found to have been founded upon a false principle or to have become inapplicable to changed conditions of the present time. There can not be said to be, in any proper sense, such a thing as a vested right which would be interfered with by such change, so far as it is not re-

tropective in its application. In the language of an eminent judge, "Administration and remedial procedure must change from time to time with the advancement of legal science."

Our ancestors, had they ten times their wisdom, had no more right to bind posterity by a hard and fast rule of remedial procedure by placing it in the organic law than by rules of statutory enactment. In every department of knowledge, from mechanical to political economy, to-day does not hesitate to challenge yesterday to give a reason for its opinion, and hoary age as well as callow youth must submit to the same judgment. Even in theology the advancing tide sweeps away barrier after barrier erected by superstition to stay the progress of free thought. It is time, then, to apply the test of common sense and of practical utility to many provisions of our procedure for the administration of the criminal law and to amend or to abrogate them, unless they are found to be either necessary or useful.

The supreme duty of society to its members is to furnish, as nearly as possible, complete and absolute protection to life and property through the administration of the criminal laws. Every coigne of vantage in our criminal procedure, which is found to afford a shelter and protection to the criminal, or to needlessly hinder the prompt detection, conviction and punishment of crime, should be courageously challenged, however hoary with age, or shining with the fine new gloss of modern invention, and when found not to be necessary for the protection of innocence, unjustly accused, or to afford a fair and impartial trial to the guilty, should be unsparingly destroyed.

The criminal is no such babe in swaddling clothes; no such helpless mendicant that he should be so carefully guarded and protected lest perchance the red ogre of law should devour him. He has advanced somewhat in his ability to protect himself, since the days of *Magna Charta*, when it was thought necessary to enact that he be first tried before being hanged.

There was a time in the history of our race when the person accused of crime writhed a helpless victim in the strong grasp of the law; when, under forms of procedure then in force for the administration of the law, it mattered little whether he were guilty or innocent; and when the punishment for the most venial offenses was such as would now shock humanity if applied to the most atrocious crimes.

Denied the right to call witnesses in his defense, or to have them sworn; denied the right to be heard by counsel, or to be informed of the specific acts charged against him; subject to the most excruciating torture which human ingenuity could devise, under which he frequently confessed a crime of which he was not

guilty; consigned to the custody of a jailer; prosecuted by an officer; tried by a judge, each of whom held his office at the arbitrary will of the despotic power which was bent upon his destruction, the person accused of crime, no matter how black his guilt, was an object to arouse pity and sympathy.

It is small wonder that, as civilized government emerged from this state of semi-barbarism, extraordinary means should be devised to protect the citizen from a recurrence of such a condition. In the recoil the pendulum swung too far, and forms of procedure originally devised as a necessary protection for the innocent, became unnecessary for that purpose, and are now a refuge for the guilty. From a shield of defense they have become a sword of defense, and, from the vantage ground thus prepared for him, the desperate and powerful criminal safely and often successfully defies the government and all the organized forces of society to bring him to punishment within the forms of law.

Our humanitarianism, our hatred of arbitrary power and regard for the rights of the individual, as against the rights of organized society, have all combined to lead us too far in the direction of obstructing the administration of the criminal laws by forms and devices unnecessary for the protection of the innocent and useful only in securing immunity from punishment to the guilty.

Under this impulse legislative enactments and constitutional provisions have been stretched by judicial construction to the farthest verge of possibility, certainly far beyond the original intention, liberal as that was in its mistaken benevolence.

There is no question that the difficulties, the delays and the oft-time entire failure in bringing to punishment wealthy or influential criminals, has become, in fact has always been, a public scandal and disgrace, and public criticism is launched at the judge, the jury and the attorneys for the defense in turn. It seems to be forgotten that the law under which he is being tried has itself furnished him the means to delay, to evade and finally to escape punishment.

The criminal must be tried upon an indictment presented by a grand jury, though it would puzzle one to give a sensible reason why he should not be tried upon an information presented by the district attorney as well. He must be confronted with the witnesses against him and if, by reason of their absence, beyond the jurisdiction, age or other infirmity, such witnesses can not be brought before the court, their testimony can not be taken by deposition by the State, though in either case the defendant, if he desires, may take their depositions.

If the crime is murder, though the guilt of the accused be in-

contestably established, he can not be punished if he has disposed of the body of his victim, so that no portion thereof can be found and identified, because of an apocryphal story that in the dark ages of the law and of the world, before the advent of railroads and telegraph, somebody was executed for the supposed murder of a man not in fact dead.

If taken under such circumstances that escape seems impossible, he confesses his crime, freely and voluntarily, such confession cannot be used against him unless he—poor innocent—be first warned, if at the time he be in custody of an officer, which, by latitudinarian construction, has been held to mean under any kind of restraint at the hands of anybody, though such restraint be so slight that he himself does not know he is under restraint. This is because his mediæval brother, under the influence of the rack and the thumb screw, sometimes confessed to a crime of which he was not guilty.

He has the right to be sworn as a witness in his own defense, and to have witnesses brought by compulsory process from any part of the state at the expense of the government upon a mere statement under oath that the testimony of such witness is material. He has the right that, without request or demand on his part, the law upon every phase of his defense be fully explained to the jury, though supported by his own testimony alone or other evidence incredible to the verge of absurdity, and contradicted by no matter what overwhelming weight of evidence.

Having had every opportunity afforded him to discover the private opinion of every member of the jury to try his case as to his own guilt or innocence, together with every circumstance in the life of each juror that would in any way affect his mental status towards the case on trial, he is prepared to take advantage of the means afforded him to get rid of every obnoxious juror.

If, having escaped every other cause of challenge, an objectionable juror says that he has not formed such opinion as would disqualify him, the accused has the largest limit of cross-examination to induce him to recant and conclude that he has an opinion, the most fleeting and shadowy it may be, but which "it will take evidence to remove," without at all understanding what that means.

Failing all else the defendant has the right to say to as many as ten jurors in an ordinary felony, and twenty in a capital felony, that he does not desire that they shall sit on his jury. Although needing twice as many challenges, the state is given only half as many.

And all along the pathway, from indictment to conviction, is strewn with snares and pitfalls of arbitrary and technical require-

ments which must not be violated, so far as the defendant is concerned, whether injury come to him therefrom or not, and if by some lucky chance a conviction should result, there is still a new trial to be had if, perchance, there has been a violation of any one of the many technical requirements of the Code of Criminal Procedure, which have covered and protected the defendant like the seven-fold shield of Ajax, from the beginning of his trial.

And for fear that the criminal, contemplating the gloomy prospect, should conclude that all was lost and abandon himself to the harsh judgment of the judges, our code, tenderly considerate to the last, steps in, and if he is charged with a felony, says that even in this strait he shall not, if he would, throw away the chance of escape which a trial by jury still holds out to him.

Need we be surprised then if criminals, sometimes in contemplating a crime, do not calculate the chances of conviction, but only the probable cost of acquittal?

It is a question for thoughtful consideration how many and which of these various provisions of our Code of Criminal Procedure, whether constitutional or statutory, designed to shield and protect the person accused of crimes, are either necessary or useful for any good purpose.

The limits of this paper will not allow me to call attention, in detail, to the various provisions of the constitution and the statutes to which these objections apply. Every volume of decisions of our highest Criminal Court is full of reversals on account of violation by the trial court of some unnecessary and entirely technical provision of the constitution or the code.

Take as a fair sample of the lot the decisions which are familiar to the profession, of *Cox vs. The State*, 8 Appeals, p. 254, where the indictment was held bad because it concluded, "against the peace and dignity of the statute;" that is, because it did not follow, literally, an entirely senseless formula prescribed in the constitution; of *Wilson vs. The State*, 12 Appeals, p. 487, and of *Woolridge vs. The State*, 13 Appeals, p. 443, in each of which cases the verdict was set aside and a new trial granted because a letter was omitted in one of the words of the verdict. And these decisions and hundreds like them the Court of Appeals felt constrained, and was, in fact, constrained to render in obedience to the positive provisions of the constitution and the code.

The number of these decisions gives us indication of the number of criminals, who, in the lower court, have been able by an enforcement of these provisions, to baffle justice and escape punishment.

Instead of adding more felonies to our penal code or overloading it with enactments which have to do only with the moral con-

duct of individuals, it would be of more benefit to society at large to devote the time and labor thus consumed to the serious consideration of the amendment and improvement of our Code of Criminal Procedure and the constitutional provisions cognate thereto, discarding maudlin sentiment and the disposition to gush about the "wisdom of our ancestors," and measuring every provision by the test of plain, common sense and practical utility in the light of knowledge, experience and social conditions of to-day.

The Millenium is not yet, nor can the most far-seeing eye discern on the horizon of the future any indication of the coming of the time when peace and love shall reign throughout the earth; when the lion and the lamb shall lie down together and a little child shall lead them.

Reasoning *a priore*, one would conclude that as population presses upon means of subsistence, as man's wants in the social state become more artificial and complex and as the struggle for the means to supply and satisfy such wants become greater, a certain class of crimes, those which originate in the desire, by fraud or force, to get the goods of another without an equivalent, would become more frequent, and such seems to be so. But reasoning the same way, one would conclude that the ameliorating influences of a higher degree of civilization, of education, and of all the forces of a higher social condition, would bring about a decrease in crimes of violence which have their origin in hatred, in revenge, and in the fiercer passions of humanity.

I doubt if it can be said that common experience justifies the latter conclusion. There does not seem to be any appreciable decrease in the latter class of crimes. It may be true that

"The real hardened wicked,
Who fear no power but human law
Are to a few restricted,"

but they do not seem to be decreasing in numbers or malignity.

In conclusion, let me say a word for our much abused brothers, the criminal lawyers, and in in doing so I cannot do better than quote the language of Mr. Bishop, in his work on Criminal Procedure: "It is the duty, therefore, of those lawyers who conduct defenses in criminal cases to render themselves familiar with the law of procedure, and there is nothing more truly honorable pertaining to our profession than urging, perhaps against an incompetent prosecuting officer, such as the government has no right to employ, those defenses which the rules of criminal procedure furnish, even though the result should be to set at large a wretch guilty of all manner of crimes."

Lord Brougham, in his famous defense of Queen Caroline, said: "When the necessity arises an advocate knows but one duty and, cost what it may, that duty he must discharge. Be the consequences what they may to any other persons, powers, principalities, dominions or nations, an advocate is bound to do his duty."

It is for the people, in their law-making capacity, to prescribe rules of procedure for the administration of the criminal law. It is the duty of the lawyer, a duty he may not in honor shirk or evade, in the face of the fiercest popular clamor, to maintain for his client every right and advantage which those rules of procedure accord to him.

COMMUNITY LAW.

A PAPER READ BEFORE THE

TEXAS BAR ASSOCIATION,

BY

HON. JOHN G. WINTER,

OF THE WACO BAR.

Mr. President and Gentlemen of the Association:

It had been my purpose, in response to an invitation of the executive committee, to impose upon you at this annual session my views at length relative to community laws of Texas, but circumstances have so combined that I have been unable to formulate a paper of the character contemplated; nevertheless, I now submit at least one of the points I have in mind, not expecting that any of the suggestions that may be embraced will bear immediate fruit, but verily believing that in the course of time beneficial results may follow.

Texas is yet as an infant, in swaddling clothes, compared with the growth which the future has in store for her, and any citizen, especially if he be of the legal profession, is warranted, and, indeed, it is his duty, to note any supposed imperfections in the laws that may exist, and which may yet be remedied while the body is pliant in youth, before the frame becomes hardened with advancing years.

In the economy of nature it is given to the males of all animal creation the power and capacity to control. Isolated instances there are, and have been, where the female has developed dominating qualities, but universally this has been at the sacrifice of the true characteristics of her nature, and an analysis will demonstrate that where the virile elements have been so abnormally conspicuous the result has been a hybrid, a being or thing neither male nor female.

In the progress of the human race, to man has been given the supremacy, which comes of superior mental and physical power, the capacity for broader reasoning and wiser action, the high capacity to consider the conditions of generations to appear after he has become as dust, a memory or mere tradition, or entirely forgot.

To the sense of justice existing in the dominating sex the weaker can alone look for protection, and rarely, indeed, has civilized man failed in his duty in this respect; whether it be in the enactment of laws, the exercise of a just sentiment or the resort to arms, woman—she who has not cast aside her sceptre of royal femininity—may command a host if she be in need; a weak and helpless child in danger is stronger than the strongest, for an hundred arms will to its rescue.

While justice may be moved to action by sentiment, it should never be unduly influenced by it, and yet it is apparent that such has been the influence in respect to property rights under our community laws. From a period so ancient that we cannot definitely fix it, man has provided by law, or by custom equivalent to law, for the material comfort of the surviving wife and children. The origin of the dower of the common law is uncertain; by some its wise provisions are attributed to that proper sentiment to which I have referred, and so we have it that this established law had its birth in the gratitude of the great Canute's father to the women of his realm for their voluntary sacrifices in his hour of distress and peril. This legend, if indeed it be but a legend, well illustrates the true relation of the sexes—the real strength of woman. By the gift of their jewels, heirlooms, and tokens of love, deeply cherished, those Norse women of the centuries long gone, ransomed their king, and in this they but illustrated the characteristics of true womanhood, those elements which show brightest in the hour of trial and sorrow, which made her last at the cross, and first at the sepulchre—those elements which shone so conspicuously in our great struggle and made the women of the South immortal.

Dower rights were not won by those freaks of nature, paradoxically 'clept "masculine feminines," up in arms, uniformed in "dress reform," with the strident battle cry of "Woman's Rights and Woman Suffrage." It is here to be noted and well marked, that the astute and long-headed old gentleman who owed his freedom to the rings and rubies of the ladies of his realm did not, even in the high tide of gratitude, allow sentiment to capture or warp his judgment and defeat justice; he forgot not the helpless little ones, the children of the men and women of future generations.

"Tenant in dower is where the husband of a woman is seized of an estate of inheritance and dies. In this case the wife shall have the third part of all lands and tenements whereof he was seized at any time during the coverture *to hold to herself for the term of her natural life.*" "The reason," says Blackstone, "which our law gives for adopting it"—this custom or law, from whatever source it came—"is a very plain and sensible one for the sustenance of the wife and the nurture and education of the younger children." Here we find sentiment regulated by justice, a strong, common-sense practical view, and weighing of human qualities and frailties, the same common-sense exhibited by Canute, the son, when nauseated by the sickly sentimental adulations of his obsequious courtiers, he seated himself by the seashore, to illustrate that the incoming tides and billows were governed by nature's laws, and that there was no sentiment in those laws which would protect even royalty itself against a ducking, and so he confounded those about him who had allowed the proper sentiment of loyalty to become perverted and degraded into mere man worship. Have we not permitted our love, admiration and esteem for women to unjustly influence our legislation?

We have certain laws upon our statute books which must commend themselves to the thoughtful, but yet have been much animadverted upon as a Texas innovation, and as grossly unjust. I refer to the statutes which provide for a year's maintenance for the widow and orphans, and which makes this charge a preference claim to which lien holders and other creditors must yield. The adverse criticisms to which I have alluded come, of course, from creditors, who sometimes find that these humane and statesmanlike provisions now and then, indeed, make the first last and the last first. It is quite curious to compare these laws with the ancient; to reflect how little is new under the sun. The widow and the orphan were not forgotten or overlooked by those iron men who assembled at Runnymede and we find in Magna Charta: "If any one shall die indebted to the Jews, his wife shall have her dower and pay nothing of that debt, and if the deceased left children under age they shall have necessaries provided for them, according to the tenement of the deceased, and out of the residue the debt shall be paid, saving, however, the service due to the Lords." Here the Anglo-Saxon robust sense of justice seems to have asserted itself, and the framers of the instrument add: "And in like manner shall it be done, touching debts due to others than the Jews."

Seven centuries past we find the same solicitude and wise provisions for the helpless that animated our forefathers fifty years

ago. Liens and creditors, then as now, bent to the cry of distress, and all this was the unselfish, uncoerced work of man, the master, provident for the future dependent.

Without attempting to enter upon a review or discussion of the laws to which we trace our community system, I refer merely to the general operation of that system, as it now exists. Naturally, the American Anglo-Saxon citizen turns more aptly to the rules of the common law, as developed under our English ancestors, than to those of any other system. It is to those rules which we look, with the one, I believe, momentous and important exception of the rights of widows in estate property. At the common law, the fact that the widow, no more than any other mortal, would require sustenance after death, was recognized; that she should be maintained in life as the estate might warrant, was fully determined,—she could need no more, and hence we find that she acquired, as being all that she needed, a *life* estate; the interests of the children were protected by fixed rules of inheritance, and not left to uncertain whims, caprices and influences. Under our system, we seem to think that support during life can be derived only from a fee-simple; the widow, needing no worldly comforts after this life, is invested with the full ownership and title to one-half of the estate acquired during coverture. As a rule, unversed in business affairs, accustomed to look to the husband for advice and guidance, she is suddenly vested with the power to control absolutely. A prey to the avaricious and designing, a victim to her own inexperience, she is often left very much in the situation of a lamb among wolves, liable in her own life to be bereft of the property intended by the law to be her support, and the children of the union are perhaps eternally dispossessed of one-half of their natural, and therefore rightful patrimony. To illustrate: A man has acquired one thousand acres of land. He dies, leaving his widow and five children. Five hundred acres vest in the wife, subject to such fate as good fortune, against adverse circumstances, may decree,—to be sold, conveyed or devised, as good or evil influences may prevail,—no rule to guide, no law to control, the children, as to such property, are at the mercy of such circumstances as may arise; and all these uncertainties and hazards are the result of the first good purpose that the widow shall be provided for during her *natural life*. The children each receive one hundred acres, and yet they are the fruits of the union, and nature would seem to demand that, with certainty, upon the death of the parents, such children, born of the marriage, with the indissolubly intermixed blood of both father and mother, should succeed to all. Without a voice in their own creations

they are launched upon a voyage where there are more storms, than calms, more pains than pleasure, and there should be no uncertain conditions governing their inheritance of the property of those who are responsible for their existence.

"To heirs unknown descends the unguarded store,
Or wanders, Heaven directed, to the poor."

Would the limitation of a life estate in the widow operate in any just sense as an injustice to her? I cannot conceive in what manner this fixed rule of centuries, so generally prevailing in the states of the union, acquiesced in as wise and prudent and practically adopted by us, in regard to separate estates, should be unjust or oppressive in Texas.

In adopting the life or dower rule of inheritance, no change in quantity would be necessary. Such an interest may be one-half, as now under the community, or one-third as at the common law. Should it occur that an estate is unproductive, that the object sought to be attained, support and education, cannot be realized, then our courts, in the exercise of their chancery jurisdiction, could give relief from such, or any other embarrassing and unforeseen conditions, if relief were practicable at all. The change which I advocate would secure the wife, and yet leave the husband a broad and desirable freedom and discretion, while the law would adequately protect the widow in her dower, that no injustice might be done her; on the other hand, if in the years of their married life the husband recognized qualities which would warrant it, he could bequeath his entire estate to his wife, could constitute her his executrix, make her the guardian of his children, in fact, in such cases by his last will and testament bestow upon her all and more than she can acquire under our present system, by operation of law. If a consummation so devoutly to be desired should appear to the husband, weighing the wife's situation, characteristics and capacities, to be impracticable, then other provisions would be made, looking to the interests and welfare of the survivors, or the estate would be left for administration under the law, and, under the dower rule, it would be beyond the reach of despoilers, and the husband and father would "pass over the river" with the comforting assurance that his beloved ones, wife and children, were under the protection of the broad shield of wise and beneficent laws,—safe in their estates from the grasp of an alien hand.

I have submitted my views in the most general way; the details and limitations will readily occur to the mind, should the substance of this paper ever be thought worthy of serious consideration looking to legislation. Laws regulating estates in

the direction indicated could be adopted, without causing a ripple upon the surface of things as they now are. The common law gave dower in lands, etc., of which the husband was seized during coverture, the right of dower could be defeated only by the joinder of the wife in conveying. Such is the law at present in some of the other states, while in yet others the dower interest attaches to such lands, etc., as the husband died seized.

Taken in connection with our laws governing the homestead after death, I believe that the dower rule would be of the greatest benefit.

There are millions of people yet to inhabit Texas, and the laws relating to inheritance, the ownership of the soil, are of incalculable moment. To the blood of the sire let the fee descend, and for such a law, for our timely return to the paths trod by those who have gone before us, those who come after us will rise up and call us blessed.

RECEIVERSHIPS.

A PAPER READ BEFORE THE

TEXAS BAR ASSOCIATION,

BY

HON. RICHARD MORGAN,

OF THE DALLAS BAR.

Mr. President, and Gentlemen of the Texas Bar Association:

Of all the powers affecting rights of property which courts inherently possess, none are more potent for good, none more liable to abuse, and none less clearly defined in many important particulars than those in relation to receiverships, and there is perhaps no question of greater interest or more growing importance in Texas jurisprudence than the law upon this subject.

This branch of the law, especially in some of its most important features, is as yet only in its formative period anywhere, and until a comparatively recent date our Texas courts have hardly been called upon to deal with the subject at all. But with the rapid development of the commercial and industrial interests of the state, and the rapidly increasing number of corporate enterprises, it is fast becoming with us, too, a matter of practical and every-day importance. Already we have had legislation in regard to it, and having had occasion to examine these statutes only a short while before I received the invitation to prepare a paper for this meeting, it occurred to me that it might not be uninteresting to invite your attention to some features of this legislation, which, to my mind at least, present questions of perplexing interest,—first, however, noting as briefly as possible some matters which appear to be reasonably well established independently of statutes.

Speaking for the court in *Trust Co. vs. Railway Co.*, 117 U. S., 455, the late Justice Blatchford says:

"Property subject to liens and claims and debts of various character and ranks, which is brought within the cognizance of a court of equity for administration and conversion into money and distribution, is a trust fund. It is to be preserved for those entitled to it. This must be done by the hands of the court, through officers. The character of the property gives character to the particular species of preservation which it requires. Unimproved land may lie idle, with only payment of taxes; improved property should be rented. Movable property that is not perishable may be locked up, and kept, but if perishable, it must be sold by way of preservation. A railroad and its appurtenances is a peculiar species of property. Not only will the structures deteriorate and decay and perish if not cared for and kept up, but its business and good will will pass away if it is not run and kept in good order. Moreover, a railroad is a matter of public concern. The franchises and rights of the corporation which constructed it were given not merely for private gain to the corporators, but to furnish a public highway; and all persons who deal with the corporation as creditors or holders of its obligations, must necessarily be held to do so in the view that, if it falls into insolvency, and its affairs come into a court of equity for adjustment, * * * * to have the purposes of its creation still carried out, the court, while in charge of the property, has the power * * * to make such repairs as are necessary to keep the road and its structures in a safe and proper condition to serve the public. Its power to do this does not depend on consent, nor on prior notice. Consent is desirable, but is seldom practicable, where the debts exceed the value of the property. Though prior notice to persons interested, by notifying them as parties, first requiring them to be made parties if they are not, is generally the better way, yet many circumstances may be judicially equivalent to prior notice."

As a result of the doctrine here expressed we find that, while according to the earlier authorities the appointment of a receiver to carry on a business was something which a court ought rarely, if ever, to undertake; to-day, upon the theory that the carrying on of the business is essential either to the preservation of the trust fund or to the discharge of a duty due the public, it has become the settled law and custom for courts of equity in the great majority of cases to authorize receivers, not only to keep the trust property in repair, but to manage and use it in the ordinary way, and carry on the business until such time as the court may direct a sale of the property.

It is this practice of appointing receivers to carry on a business

which gives the subject its chief importance. Out of it and incident to it have sprung other doctrines which practically give to the courts the exercise of almost despotic power over untold millions of dollars worth of property. While it is generally said, and to some extent is true, that the appointment of a receiver is not a proceeding in rem, that a sale of the property carries only the title of parties to the suit, that the judgment binds only the parties to it, and is subject to revision on appeal, still in some very important respects the proceeding is in the nature of a proceeding in rem, and the judgment of the trial court is practically without appeal.

In the first place, when a court, through its receiver, takes possession of property and authorizes him to carry on a business, it necessarily incurs expenses, and for the payment of these expenses not only the income from the business, but the property itself is liable, and this, too, irrespective of who may be parties to the suit, or what liens there may be upon the property. This doctrine has been announced by the Supreme Court of the United States in many cases, among which may be noted *Miltenberger vs. The Railway Co.*, 106 U. S., 286, and *the Union Trust Co. vs. Railway Co.*, 117 U. S., 434, in which first mortgage bondholders unsuccessfully resisted the payment of debts created by a receiver who had not been appointed at their instance, and which were incurred before the first mortgage bondholders were made parties to the suit, and *Kneeland vs. American Loan Co.*, 136 U. S., 89, in which Mr. Justice Brewer, speaking for the court, says:

"A court which appoints a receiver acquires, by virtue of that appointment, certain rights and assumes certain obligations; and the expenses which the court creates in the discharge of those obligations are burdens necessarily on the property taken possession of; and this, irrespective of the question who may be the ultimate owner, or who may have the preferred lien, or who may invoke the receivership."

Not only does the court possess this power of incurring debt and subjecting the property in its receiver's hands to its payment, but as stated by Messrs. Gluck & Becker, in their valuable treatise on *Receivers of Corporations*, pages 112, 113, "The court, in the exercise of its equity, jurisdiction and judicial discretion, may order a sale of the property before final judgment. The court takes possession of the property to preserve and protect it for all parties interested therein, whether they be mere general creditors or judgment or mortgage creditors. If such property depreciates in value by the accumulation of the receiver's indebtedness, while the litigation between the parties as to their respect-

ive interests in it is going on, the continuance of possession by the court would be injurious to the interests of such parties, and the power of the court to make an order directing a sale of the property, clear of all incumbrances, under such circumstances, cannot be questioned."

The authorities they cite seem to support the text. In one of those authorities, *Mellin vs. Moline Iron Works et al.*, 131 U. S., 352, the appellant, as assignee of one Hill, had sued to foreclose a mortgage executed by the Moline Maleable Iron Works, to secure certain of its creditors, among whom was the said Hill. In a prior suit brought by some of the unsecured creditors of the Iron Works Co., a receiver had been appointed, and in the progress of that suit, it appearing that the property was depreciating in value, the court directed its sale, and it was sold long before any final decree was rendered.

In that suit Hill was cited by publication, and not appearing a decree pro confesso was taken against him, setting aside and canceling the said mortgage so far as he was concerned.

The purchasers at said sale, as well as the Iron Works Co. and others interested in the mortgage, were made parties defendant in the second suit. Mellin contended that as to him the said sale and decree against Hill were invalid, first, because the service by publication would not support the decree, and secondly, because the sale had been made under an interlocutory decree rendered before Hill had been served even by publication. Speaking to this latter point the court says:

"A large part of the argument, on behalf of the appellant, is in support of the proposition that, as the order requiring Hill to appear and plead, answer or demur to the original and supplemental bills, was not made until after the receiver had, by order of court, sold the property, the sale was a nullity. We do not assent to this view."

Whether the condition of the property was such as to require, for the protection of the parties, that it be sold, was a matter for the court, in its discretion, to determine. There is nothing to show that the order of sale was even improvidently made, much less that it was procured by fraud, or that the property was sacrificed. If the circumstances justified immediate action, the court had power to act.

When it is remembered that the orders under which receivers incur expenses are almost invariably interlocutory and made frequently, if not usually, on *ex parte* applications, and when in addition to that the court has power, by an interlocutory order, to sell the property in its custody, free of all claims, when in its discretion that seems to be the proper way of preserving the fund.

it requires no great stretch of imagination to comprehend how theoretical doctrines in regard to parties being entitled to their day in court, and having a right of appeal, etc., may often prove practically of little consequence. But perhaps the most interesting phase of this whole subject is the power of courts of equity to give priority to unsecured creditors over mortgage creditors.

A due regard for your patience, however, precludes anything but the briefest reference to it at this time.

It has received the consideration of the Supreme Court of the United States in numerous cases, and it was in reference to this that Mr. Justice Brewer, speaking for the court, in *Kneeland vs. The American Loan & Trust Co.*, 136 U. S., 97, said:

"The appointment of a receiver vests in the court no absolute control over the property and no general authority to displace vested contract liens. Because in a few specific and limited cases this court has declared that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a court appointing a receiver acquires power to give such preference to any general and unsecured claim * * * * *
Indeed, we are advised that some courts have made the appointment of a receiver conditional upon the payment of all unsecured indebtedness in preference to the mortgage liens sought to be enforced. "Can anything be conceived which more thoroughly destroys the sacredness of contract obligations. One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot. "So when a court appoints a receiver of railroad property it has no right to make that receivership conditional on the payment of other than those few unsecured claims which, by the rulings of this court, have been declared to have an equitable priority. No one is bound to sell to a railroad company or to work for it, and whoever has dealings with a company whose property is mortgaged, must be assumed to have dealt with it on the faith of its personal responsibility and not in expectation of subsequently displacing the priority of the mortgage liens. It is the exception and not the rule that such priority of liens can be displaced. We emphasize this fact of the sacredness of contract liens for the reason that there seems to be growing an idea that the chancellor, in the exercise of his equitable powers, has unlimited discretion in this matter of the displacement of vested liens."

It will doubtless be noticed that notwithstanding the earnestness of this protest against what is denominated a growing error, there is nevertheless the distinct admission that there are some classes of unsecured claims which are entitled to an equitable

priority over mortgage liens; and while they are denominated exceptions to a rule, they are, nevertheless, as firmly established as the rule itself.

The reasoning by which these so called exceptions have been sustained has not always been the same, and since the whole of this doctrine is the mere offspring of judicial reasoning, why may not new conditions of fact appeal with equal confidence to the equitable consideration of courts of last resort, and, invoking the application of more advanced views of equitable principles, establish still other classes of exceptions to the rule? In *McIlhenny vs. Binz*, 80 Texas, 1, this subject received the careful consideration of our own Supreme Court, and priority over mortgage creditors was there accorded to a class of claims which had never previously been held to be entitled thereto.

Among other questions involved was a contest for priority between the mortgage creditors of a railway company and certain unsecured creditors who had constructed new roads for the company before the receiver was appointed. The court below, in its final decree, directed the payment of these construction claims out of the proceeds of the sale of the mortgaged property in preference to the bonds secured by the mortgage. Upon appeal by the mortgage creditors this was affirmed.

If time permitted, it would afford me great pleasure to quote more fully from the very elaborate and able opinion in that case, but a few brief extracts will perhaps suffice for the purpose now in hand. Speaking for the court, Justice Gaines says:

"Though the doctrine is of recent origin, it has become settled law in this country that in the final distribution of the assets of an insolvent railroad corporation, which has been placed in the hands of a receiver, there are certain claims against the fund which, under certain circumstances, are entitled to priority of payment over the debts of the corporation secured by mortgage upon the property (citing several decisions of the Supreme Court of the United States). The expenses of operating the railroad, while in the hands of the receiver, have been uniformly allowed, and it would seem that as to claims of this class there should never have been any serious difficulty. Being the expenses of administering the trust fund, they should be a first charge upon its funds and should be awarded priority of payment. The cases cited also show that debts incurred by the company in operating its road, including necessary repairs and useful improvements, within a limited time before the appointment of a receiver, have, at least as to the current earnings, been allowed a preference in payment over the bonded debts secured by mortgage upon its property; and where the earnings have been diverted to the pay-

ment of interest upon the bonds and in making betterments upon the property, the holders of these claims have been reimbursed from the proceeds of the sale of the railway. The reasons assigned for this doctrine are not the same in each of the cases." After reviewing some of these cases he proceeds as follows: "The claims we now have under consideration are for construction of new road before the receiver was appointed and for material furnished for such construction. * * * * *

It has been held that claims for construction, unless the work was done or the material furnished in pursuance of an order of the court, cannot be allowed priority. We may concede that, as a general rule, this is correct. But we think there may be construction claims which appeal as strongly to the conscience of a court of equity as the debts which are commonly known as operating expenses, and we further think we have such claims in those now under consideration." Then follows a discussion of the facts and the equities arising therefrom, and the opinion upon this point concludes as follows: "We have found no case in which preference to claims for work done and material used in construction of new road have been given a preference over the debts secured by mortgage. On the other hand there are several cases in which such preference has been denied; but we think each of these cases differs in some important particular from this. * * * It follows that we are of opinion that the court did not err in awarding priority to the construction claims."

As to the time within which such unsecured claims must have accrued, no fixed rule has been established by any court. While it is usual for the trial court, in its general order providing for their payment, to direct the payment of such as have accrued within a specified time prior to the receivership, usually not longer than six months, still, as is said in *McIlhenny vs. Binz, supra*, "In the Supreme Court of the United States claims have been allowed which accrued for a much longer period before the receiver's appointment," and in that case the judgment of the lower court, denying priority to some claims, because they had accrued more than six months prior to the receivership, was reversed.

While, by the decisions of the Supreme Court of the United States, as well as by those of the Supreme Court of Texas, it is firmly established that claims against a receiver of a railroad for damages for injuries to person or property, accruing during the receivership, are a part of the expenses of the receivership and are entitled to the same priority of payment as other expenses,

nevertheless no court has ever yet held any such claims, accruing prior to the receivership, entitled to any such equitable priority.

The act of April 2, 1887, entitled "An act to provide for the appointment of receivers and to define their powers and duties, and to regulate proceedings under such appointment of receivers," is practically the first legislation in this State upon this subject, inasmuch as the articles inserted by the commissioners in the revised statutes of 1879, related merely to matters of practice, and did not in any essential particular modify the jurisdiction which existed independently of statute.

Sections two and six of that act were subsequently amended by the act of March 19, 1889, and these two acts embody all of our legislation upon this subject except so much of the act of April 13, 1892, as provides for an appeal from an interlocutory order of the district court appointing a receiver.

Considered as a whole, it appears to be the purpose of the act of 1887 to regulate rather than to abridge the jurisdiction inherently possessed and exercised by courts of equity. Indeed, the first section of the act appears to be designed to enlarge this jurisdiction, in that it authorizes the appointment of receivers first in certain specified cases, and lastly, "in all other cases where receivers have heretofore been appointed by the usages of the courts of equity."

Section sixteen, however, is as follows: "No corporation shall be administered in any court for a longer period than three years from the date of such appointment; and within three years such court shall wind up the affairs of such corporation, unless prevented by appeal of litigation."

This section suggests several queries: Is the language "no corporation shall be administered" equivalent to saying "the business of a corporation shall not be carried on by a receiver, and its property shall not remain in the hands of a receiver?"

If so, does the proviso "unless prevented by appeal of litigation" apply to the receivership, as well as to the winding up of the affairs of the corporation, or is it limited to the latter?

If within three years a final decree is rendered and an appeal taken therefrom, would the trial court, pending that appeal, have power to direct a sale of the property, if for the preservation of the fund, or other equally sufficient reason, a sale might appear to be necessary?

If such power exists, would it not be the duty of the court to direct a sale to prevent a continuance of the receivership beyond three years?

Would the mere lapse of time, ipso facto, vacate the receiver-

ship; or would it require a decree of court to accomplish that result?

If the three years elapse before a final decree is rendered, and the court in which the receivership is pending sees fit to continue it, by what means can the provisions of this section be enforced?

None of the provisions of this act undertake to give to unsecured creditors of a corporation any preference over mortgaged creditors so far as the mortgaged property itself is concerned, but sections fourteen and fifteen do purport to give such preference as to the earnings which may result from the receiver's management of the property. Section fifteen reads: "All judgments, claims or causes of action when determined, existing against any corporation at the time of the appointment of a receiver, shall be paid out of the earnings of such corporation while in the hands of the receiver, to the exclusion of mortgage action; and the same shall be a lien upon such earnings."

Section fourteen, in substance, declares that when the receiver under order of court expends any of the earnings in making improvements upon the property, and there are any "floating debts" against the corporation, the proceeds of the sale of the mortgaged property shall, to the extent of the earnings so expended, be applied first to the payment of any "unpaid debts, or judgments, or claims against the corporation." One question which has arisen in reference to these two provisions of the statute, and which so far as I am informed, is still pending before one of our Courts of Civil Appeals, is whether or not they apply in the case of mortgages executed prior to the enactment of the statute, and the affirmative of the question is ably maintained.

Another equally interesting question which they suggest is whether or not claims which courts of equity have usually held to be entitled to equitable priority, such for instance as debts for labor and supplies incurred by the corporation in operating the property, still retain their privileged position, or are they put on the same footing with all unsecured debts?

The act of 1889, amending section six, of the act of 1887, declares among other things, that "All moneys that come into the hands of a receiver, as such, shall be applied as follows: First, to the payment of all court costs of the suit; second, to the payment of all wages of employees due by the receiver; third, to the payment of all debts due by the receiver for materials and supplies purchased during the receivership by the receiver for the improvement of the property in his hands as receiver; fourth, to the payment of all debts due for betterments and improvements done during the receivership to the property in his hands

as such receiver; fifth, to the payment of all claims and accounts against the receiver on contracts made by the receiver during the receivership, and for all claims for stock and personal injury claims against said receiver accruing during said receivership, and all judgments rendered against said receiver for personal injuries and for stock killed; sixth, all judgments recovered against the person or persons or corporations in suits brought before the appointment of a receiver in the action. And said claims shall have a preference lien on all of the moneys coming into the hands of the receiver which are the earnings of the property in his hands, and the court shall see that the money coming into the hands of the receiver as earnings of the property in his hands is paid out on the claims against said receiver in the order of their preference as named above, and it shall be the duty of the receiver to pay the funds in his hands which are the earnings of the property while in his hands as receiver, on the claims against him in the order of preference named above."

So far as the receiver is concerned, it is clearly his duty to make only such payments as the court which appoints him may direct, and whatever may be the meaning of this statute, as to the order in which payments are to be made, the duty of interpreting it devolves upon the court, and not on the receiver. The contrary, however, has been seriously insisted. It has been further insisted that under the provisions of this act, and of section 15 of the act of 1887, a judgment against a street railroad company upon a claim for damages for personal injuries rendered prior to the appointment of a receiver, was entitled to be paid out of the receiver's earnings in preference to claims for labor and supplies constituting a part of the operating expenses incurred just prior to the receivership.

While it is true that there are some expressions in the statutes, which, upon a casual reading seem to justify this contention, still I am inclined to the opinion that a more careful study of the whole statute will show that such a construction is unsound.

In the first place, while by the terms of section 15 all creditors whose claims antedate the receiver's appointment are given a lien upon all of the receiver's earnings, it is clear that the word "all" cannot be taken in its broadest and most literal sense; mortgage creditors, at least, must be excluded from the creditors to whom the lien is given, and by section six, before its amendment, the receiver's expenses at least were to be paid before there would be any earnings to which the lien would attach.

Inasmuch as the expressed purpose of this section is to secure priority against mortgage creditors, it would seem that the cred-

itors to whom, and the earnings upon which the lien is intended to be given, are all creditors, who but for the statute would be postponed to the mortgage creditors, and all earnings, which but for the statute, would be applied to the payment of the mortgage debts.

Such a construction gives to all the general unsecured creditors of a corporation a prior lien, as against mortgage creditors, upon all the earnings of the receiver that may remain after paying the expenses of the receivership, and such debts of the corporation as are entitled to an equitable priority over mortgage creditors under the rules established by courts of equity.

This much seems tolerably clear, but what is meant by that portion of the act of 1889 which we have quoted above, certainly presents a wide field for judicial speculation.

In the first place, it makes no discrimination between the receiver's earnings and the proceeds of a sale of the property, but in broad and general terms declares that "all moneys that come into the hands of a receiver shall be applied" as therein directed.

To hold that it prescribes a rule to control the court in its administration of the receivership, would place a most embarrassing limitation upon the inherent and necessary power of the court to direct the manner and purpose of the disbursements which its receiver makes. The statute omits altogether from its classification of claims to be paid, many which surely were not intended to be defeated or delayed. No provision is made for the payment of taxes, nor for any of the receiver's operating expenses except the wages of his employes, nor for many other things which in many instances might be essential to a proper administration of the trust. Surely the language of a statute which would so seriously impair the exercise of a power and discretion so essential to the proper exercise of the court's jurisdiction, ought to be much more precise and unequivocal than that of the statute we are now considering.

On the other hand, to hold that this statute prescribes a rule, not for the court's administration of the receivership, but for the distribution of assets at its close, would defeat the whole purpose of our legislation on this subject.

That purpose is unquestionably to give unsecured creditors of a corporation a right to payment out of the receiver's earnings in preference to mortgage creditors, and to prevent any defeat of that right through the expenditure of such earnings in the improvement of the mortgaged property. But if this act of 1889 prescribes a rule for the distribution of assets, it not only omits altogether to provide for claims which have always been regarded by courts of equity as entitled to special consideration, but

under paragraphs three and four of the sections above quoted, every dollar that can possibly come into the receiver's hands, over and above what is required for the payment of court costs and the wages of his employes, can be appropriated to the exclusive benefit of the mortgage creditors, by incurring debts, in the improvement of the mortgaged property.

Whatever, therefore, may be the intention of this amendment, it surely was not its intention to produce any such suicidal result as this.

This statute has not been drawn with the care and precision which its importance would seem to demand, and it is with great diffidence that I venture my opinion as to what it does mean. But from a careful reading of both acts, the true purpose of that portion of the act of 1889, which we are now considering, seems to be to put a limitation, not upon the power and discretion of the court, but upon the holders of judgments against the receiver; thus explaining and limiting rights attempted to be given by other portions of the same statute to such judgment claimants.

By far the greater part of this amendment consists of provisions designed to benefit the holders of judgments against receivers upon causes of action arising during the receivership, it being repeated as many as four different times that such judgments are liens superior to the mortgage lien on all the property in the receiver's hands. Indeed, I think there can be no doubt but that the main purpose of this whole section is to secure the payment of such judgments.

Among other things, it is provided that if the receiver has in his possession moneys subject to the payment of any judgment against him, and the court in which the receivership is pending refuses to order said judgment paid, the plaintiff in the judgment, upon filing an affidavit of these facts in the court where the judgment was rendered, may have his execution and levy upon and sell any property in the possession of the receiver.

It doubtless occurred to the framers of this statute that under its provisions importunate judgment claimants might embarrass the court in its management of the business of the receivership, and to prevent this appears to be the design of the directions contained in the statute in regard to the payment of claims against the receiver, judgments against him being postponed to everything else except judgments against the defendant in suits brought before the receivership was begun.

Possibly, in the event of an attempt to enforce collection in the mode indicated by the statute, the court might not be as much embarrassed as the judgment plaintiff. But, at any rate, under

the construction above suggested, we avoid many difficulties otherwise encountered. The right to demand payment of such judgments at any time that there may be money enough on hand for that purpose, is granted, and at the same time the right of the court to direct the disbursement of the receiver's earnings is preserved; the doctrine, as well of courts of equity as of the fourteenth section of the act of 1887, that ultimately all expenditures of earnings for improvements, must be accounted for and refunded for the benefit of unsecured creditors entitled thereto, is maintained, and the rights of such claimants as are regarded by courts of equity as entitled to an equitable priority, are in no-wise impaired or disturbed.

Speaking of the law of receiverships as applied to insolvent railroad corporations, the late Justice Miller, in his dissenting opinion in *Barton vs. Barbour*, 104 U. S., 137. makes this remark: "The appointment of receivers, as well as the powers conferred on them, and the duration of their office, has made a progress which, since it is wholly the work of courts of chancery, and not of legislatures, may well suggest a pause for consideration."

The same thought, in connection with every other class of receiverships, has doubtless occurred to others. But at the same time it should not be forgotten that hasty and ill-digested legislation often produces greater evils than those it undertakes to cure.

PRIVATE CORPORATIONS.

A PAPER READ BEFORE THE

TEXAS BAR ASSOCIATION,

BY

HON. JAMES C. SCOTT,

OF THE FORT WORTH BAR.

Mr. President and Gentlemen of the Texas Bar Association:

The subject of private corporations has heretofore been discussed before this Association, as well as before many of the associations of our country. Much has been said, and much must be yet spoken and written.

I believe it is a part of our highest duty to make straight paths and plain roads, so those subjects that effect the land most will be understood.

Bad legislation is sometimes laid to the efforts of our profession, but it is ignorantly done; for as the good physician will warn against diseases, so will the good lawyer warn against the danger of growing evils, and does not hesitate to cry aloud at their approach.

It will serve no purpose to go back to the beginning of private corporations, nor to define them. We all know that they are unnatural bodies, without a place in the world's economy, incapable of the relationship to other bodies, of nationality, or of individual responsibility of citizenship; and nearly akin to Josh Billings' mule, to wit: "No pride of ancestry or hope for posterity."

Two motives prompt men in forming private corporations: First, to secure the aggregation of capital for some great undertaking, and also to secure a succession of interests and a succession of rights. Second, for speculative purposes without risk to the originators. In other words, to array a speculative mind against another's money. Man's greed appears to predominate over all of them in a little while, whatever the purpose

may originally have been: stock jobbers have their field in almost all of them, hence the need of a better legislative control than now exists.

Corporations began to attract the attention of the courts of our country as early as 1819, when the Supreme Court of the United States announced that a charter of a private corporation bestowed certain privileges that the creative power itself, the legislature, cannot change or abridge without the consent of the corporation. In other words, the charter created a contract inviolate on the part of the state. (*Dartmouth College vs. Woodward*, 4 Wheat., pp. 473-476.) I believe that decision has been followed by all the courts of the several states since then.

Our state constitution, Art. 12, Sec. 2, provides: "General laws shall be enacted providing for the creation of private corporations, and shall therein provide fully for the adequate protection of the public, and of the individual stockholders." Section 1 of the same article forbids the formation of private corporations except by general laws.

Have our lawmakers passed such laws as directed by the constitution? I maintain they have not.

The flood gates were thrown open in our state by the act of the legislature passed December 2, 1871, wherein three or more persons, two of whom must be citizens of this state, could adopt such articles as they desired, present them to the Secretary of State, who had no power of scrutiny or discretion, but required to file them, and thus a new body was brought into existence, with no restrictions or means of protection reserved; no authority vested anywhere to see the proposed charter was in legal form or for a lawful purpose.

There were twenty-six purposes expressed, and the twenty-seventh was a sweeping, or general clause, so it should not conflict with the constitution or laws of this state. That same law was substantially re-enacted April 23, 1874, and for a few years no changes were made, but in 1885 (p. 59) the work of amendments began. That act reduced the number of purposes to twenty-four, one of which, the sixth clause, was questioned by our Supreme Court in the 63 Tex. Rep., p. 533. I believe every succeeding session of the legislature has amended and re-amended the law up to and including the last session (Acts 1893, pp. 109-112), where the purposes for which parties may incorporate are now increased to forty-seven; and one clause, thirty-nine, I regret to see, authorizes the formation of a corporation to speculate in real estate in any state or foreign country, but to own no land in this state except for its office.

My observation and experience in corporation laws, as well as

the manner of conducting their business, make me look upon that clause as a license to inflict on other countries impositions and possibly frauds our own state will not license here. I will add, by way of parenthesis, I believe no state should grant a charter to its own citizens to carry on business exclusively in some other state or territory beyond its own borders. I do not believe the comity of state laws require it, and strong reasons may be given that will not be touched here.

The present corporation law bids fair to exist at least two years without change, when the next biennial legislature will doubtless provide the usual number of amendments.

The readiness with which corporations can be formed has afforded every facility for the association of three or more men to combine together to avoid the law's responsibilities and its burdens. One of its features is that the outlines of the statutory requisites of a charter are given in R. S., Art. 567, and the organizers of many of the cheap corporations get a notary public to draft such a form as he can (acting upon the supposition that this short section of the statutes embodies all the requisites), for the privilege of taking three acknowledgements, and the Secretary has no discretion, but must receive and file it.

Our laws make a stockholder liable for the debts of the corporation only to the extent of his unpaid stock, and the rapidity of forming corporations is shown by our public records.

The report of Hon. Geo. W. Smith, Secretary of State, made last November, shows that during the two years preceding there were filed 45 charters for corporations without capital stock, 90 amended charters, and 828 new corporations formed with capital aggregating more than \$65,000,000.

Also 37 railroad charters with capital aggregating some \$44,000,000, as well as 28 amended railroad charters. There were also filed 275 foreign corporations, with capital aggregating \$714,000,000; and one life insurance company with capital unlimited. Permits were granted under the legislative act of 1889 to do business in this state.

I have not taken time to ascertain how many private corporations exist within our state, but the number formed during the past two years are sufficient to indicate that it is a fruitful source of venture. The rapidity with which private corporations are being formed and the easy manner of advertising the "Authorized capital, dollars," without any actual capital paid in, is a means of imposing upon the public which the legislature should make haste to remedy.

I will call attention right here to the fact that every amendment of the law, as well as the original corporation act, appears

to have had in view the one object of making it very easy for parties to incorporate without the safeguards required by the constitution.

I knew one corporation recently, with its authorized capital of \$10,000, formed by a man, his wife and a friend, to whom they gave one share of stock (not one dollar passing). That corporation flourished for a time, then failed owing over \$65,000 of debts. The corpus of the property realized some \$18,000, which was the fruitful source of some strong litigation between contending creditors, the "outs" and the "ins." That same man and wife are now running another corporation in the same town very successfully, and are living in considerable ease.

I have had occasion recently to investigate another \$10,000 authorized capital corporation. There was not stock enough on hand to pay the expenses of a suit. Three insolvent men composed it. They each held one share of "full paid" stock, and all their combined capital consisted of \$60 or \$70 of merchandise. Each one of them was as indifferent to the pressing creditor, as the famous Arkansas traveler was to the elements.

Our laws make no provision what amount of the capital shall be paid in except as to railroads. The statutes are silent on that important point.

In *Galveston Hotel Co., vs. Bolton*, 46 Texas Rep., 644-5, our Supreme Court said all the stock must be taken before a subscriber can be forced to pay. The court refused to follow that case in *Compress Co. vs. Saunders*, 70 Texas, 701-4, where the court held it was no defense to a party, that all the stock was not taken. This latter case draws a distinction between a subscription before and after incorporation: In both the cases referred to, the subscriptions were made before the company was incorporated, which fact was overlooked in the latter case as shown in the reference, on page 704.

Again, in *National Bank vs. Texas Investment Co.*, 74 Texas, 435, the Supreme Court held the validity of a corporation does not depend upon the subscription to the stock, or its payment; "on the contrary, it is expressly provided, that the existence of the corporation shall date from the filing of the charter in the office of the Secretary of State."

I do not propose to discuss these decisions, but they show a want of wholesome statutes on corporations. These decisions show that a corporation may do business without any paid up capital.

We are told, that at first, private corporations were formed to accomplish some great enterprise, public in its nature, that private means were not sufficient to accomplish. A special grant

had to be obtained for it. Lately the law-making powers appear to have had a strong desire to facilitate their formation, and have made their formation a source of revenue by the fees charged for filing charters.

I am in favor of our legislature passing laws requiring all private corporations (except railroads, and possibly some others) to file their charters for record in the county of their principal offices, also limit the time in which they shall place their stock, and require them to have a reasonable amount of their capital actually paid up before the charter shall be granted. The proposed charter should be submitted to some authority, to see that it is for some one of the permitted purposes, as well that it is in proper form. Every such corporation should be required to make annual reports in duplicate, one copy for the department of state, the other copy should be filed with the county clerk of the principal office of the corporation. This report should show the amount of capital stock actually subscribed—the actual amount of capital paid up, the assets, and the amount and character of its debts; the names and residence of its directors. A failure to file the report within a certain time, should merit a penalty.

There is a similar law now in force in the state of New York. There the penalty for not disposing of the stock within three years, or for not making such a report for a month is the forfeiture of the charter without further declaration. (Vide 15, L. R. A., 240).

I believe that the directors of every corporation should be personally responsible for any debts incurred in excess of the capital actually paid in, and bonds should not be issued in excess of the actual working capital. When the legislature shall pass some such law, then will it meet the constitutional requirement of providing "for the adequate protection of the public and of the individual stockholders." We have no such restrictive law now; the directors have almost an unlimited power over the corporation business, they can wreck it at any time they desire, and the small stockholders, as well as the public, are at the mercy of their disposition. I maintain that the same power that creates a corporate body, should also prescribe its limits, and not give any set of men an unbridled license, subject to no control except their avarice.

Our statutes provide that three or more persons may form a private corporation. Nothing is said who such persons shall be. I have already referred to one corporation formed by a man, his wife, and one other man. If it had been the man, wife and child it would have been three persons within the letter of the law, if not within the spirit of it. The statute says directors

shall be elected, but does not say a director shall be a stockholder.

A case may arise where one man may become the owner of all the stock. This sometimes happens in their history: The law is silent on that subject. It has been held in Kentucky, where a corporation was formed under a general law, that where one man becomes the owner of all the stock, that the corporation was not necessarily dissolved, but the corporate powers were held in suspense until the stock can be placed among the required number. (*Louisville Banking Co. vs. Eisenman*, 21 S. W., Rep., 531-4, quoting cases decided by several other courts.) If a corporation, or its officers, exceeds its charter powers and do a business not authorized by the charter, the directors should be held personally responsible; but our courts have held to the contrary. In the case of *Letchworth vs. Macy* and others, a purported benevolent association, chartered as such, issued regular life insurance certificates, and followed the business of a life insurance company in the most approved manner. The corporation became insolvent. Plaintiff sued the officers for money obtained under false pretenses. Thompson in his work on *Officers and Agents of Corporations* says such are liable. So says Taylor on *Private Corporations*; but our own court held that Macy and his associates were not liable to the plaintiff, which was affirmed by our Court of Appeals in an oral opinion at the Tyler term, 1886.

Our statutes are too meager in prescribing the rights of stockholders and their meetings. Every holder of stock is bound by the charter and by-laws—that is, if there are any by-laws. The statute says, "The directors may adopt by-laws for the government of the corporation."

If the directors fail to adopt by-laws, by what will the stockholders be governed? Or if they shall make one copy of by-laws and lock that copy in a safe, it is no advantage to the individual stockholder. I know at least one instance of each of such cases stated.

There should be a statute fixing the annual meetings of the stockholders. I do not believe our own courts have been called upon to pass upon some of the questions of the rights of stockholders, yet it is a constitutional command.

It has been held in California that a notice must be given the stockholders of an annual meeting, the time and place, and a holder is not bound by the action of a majority unless he had such notice, or all stockholders were present and participating. A by-law fixing such a meeting was not sufficient (*S. B. Mfg. Co. vs. Vas-*

sault, 50 Cal., 536). Some decisions in Massachusetts are to the same effect.

I believe the law of agency should be strictly applied to officers of corporations. Where they exceed the expressed powers of the charter, they should be personally liable to third parties. The acts of the directors may be without power to bind the corporation, and yet within the apparent scope, and third persons misled to their injury, as in *Pearce vs. Railroad*, 21 How., 445, and in *Thomas vs. Railroad Co.*, 11 Otto, 72.

If men, as directors, knowingly act beyond their corporate authority, and the principal is not bound, every sense of justice will say the director should be bound. I maintain that as much force should be given to every unauthorized act as to a direct representation of the financial standing of the company. In the latter case our Supreme Court held the directors liable where they induce deposits to be made in an insolvent bank. *Seale vs. Baker*, 70 Texas, 283; also, *Kinkler vs. Junica*, 84 Texas, 117. Other cases might be cited, but this is sufficient on this point.

I believe also that some provision should be made for the forfeiture of a charter at the instance of the stockholders, without the necessity of making the state a party to the suit. Our Supreme Court, in *Pickett vs. Abney*, 84 Texas, 648, say, "The judgment forfeiting the charter is a nullity, as the State was not a party to the suit."

I submit that where a court of competent jurisdiction is satisfied, at the request of one or more stockholders, that the continuance of the corporation cannot promote the interest of the stockholders, it should be empowered to act upon such information and pass such judgment of forfeiture, or such other order, as may be necessary to protect the interested parties. I can see no more necessity for making the state a party in a suit to forfeit a charter than in a suit of trespass to try title. In such a case a court will set aside a patent to a body of land and cancel it at the suit of some individual without the state being before the court. I think the state is no more interested in the one case than in the other.

I insist some precautionary measure should be passed as to issuing charters to purely speculative corporations, or "bubble corporations." They are not intended to benefit the state or its citizens except the few schemers who form them. The state has a right, and owes it to her honest citizens as a duty, to refuse to lend its sanction to impositions.

I want it distinctly understood, I am not opposing private corporations to combination of capital for all legitimate purposes, but I do oppose "bubbles," of forming sham corporations, of

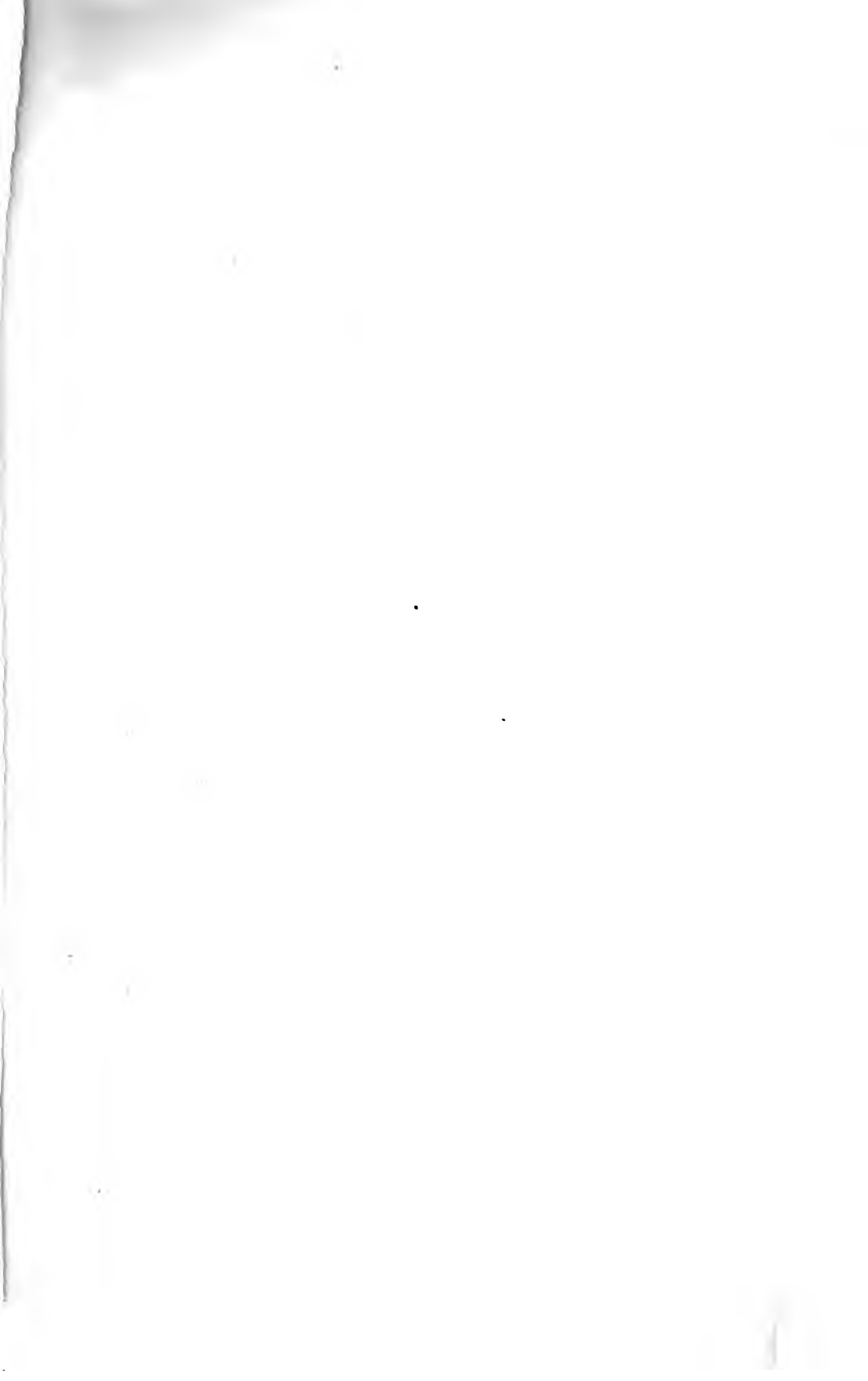
opening the state doors for swindling the public, and then put it beyond the power of any one except the state to question the legality of such schemers. It enables bad men to lay back upon the dignity of the state for their vindication. In all economic political matters whatsoever unsettles the confidence of the trading public, is injurious to the public. It is impossible to foresee and guard against all the ills the greed and haste of men will entail, but I maintain that these bodies created by law should also be controlled by law.

Corporate influences on the markets of our state are not so great as they are in some of the older states, but the time is coming, and not far hence probably, when they will be a very potent factor.

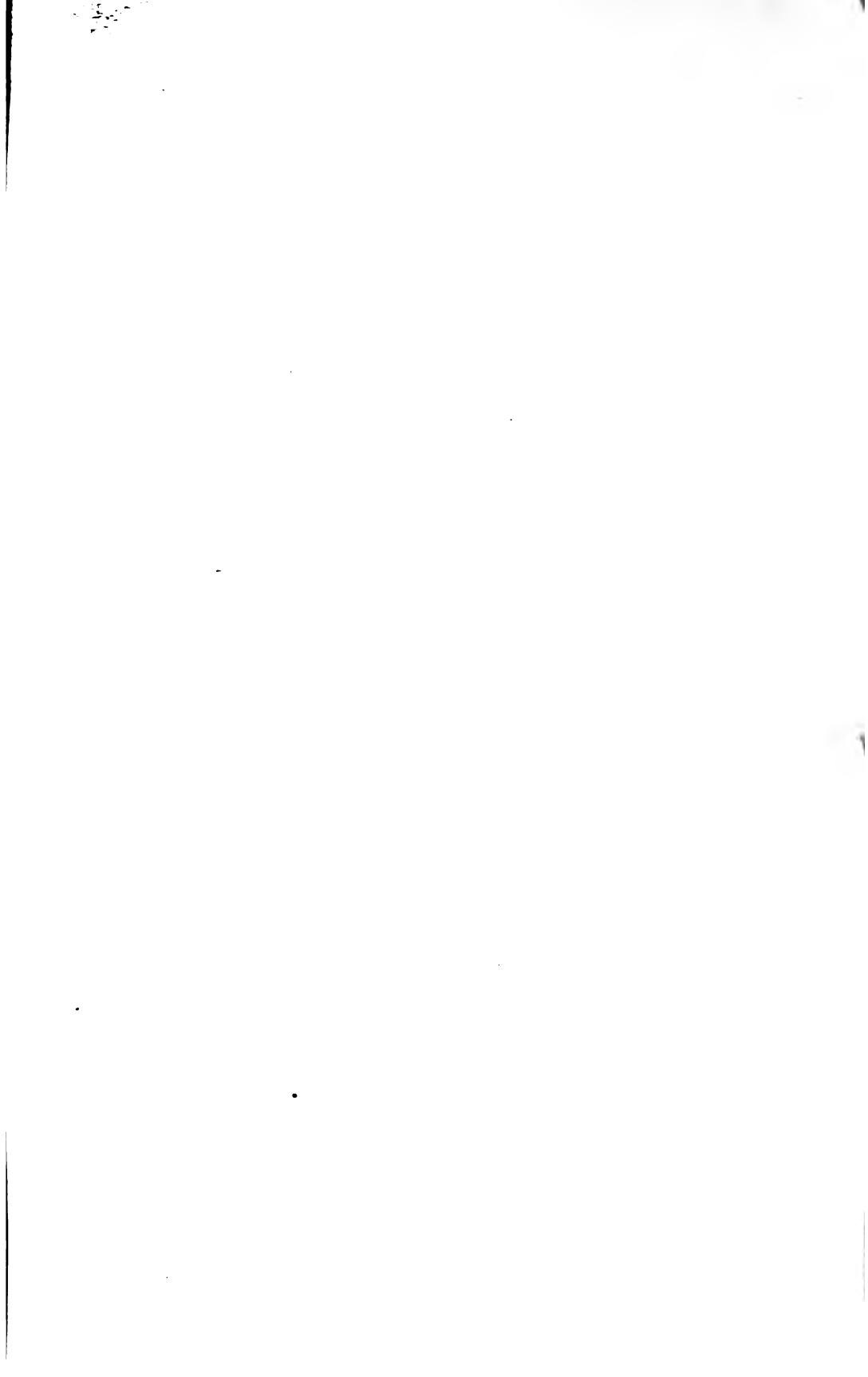
In a recent number of the Literary Digest is an article on the financial question of the present. It says: "The cause of the acute form of semi-panic characterizing Wall Street this spring is not the silver legislation. Its immediate cause was the reckless conspiracy of a group of speculators who combined to work up to fictitious heights the shares of certain industrial corporations of whose real value the public knew nothing," etc. And so as far as we are disposed to push our investigations.

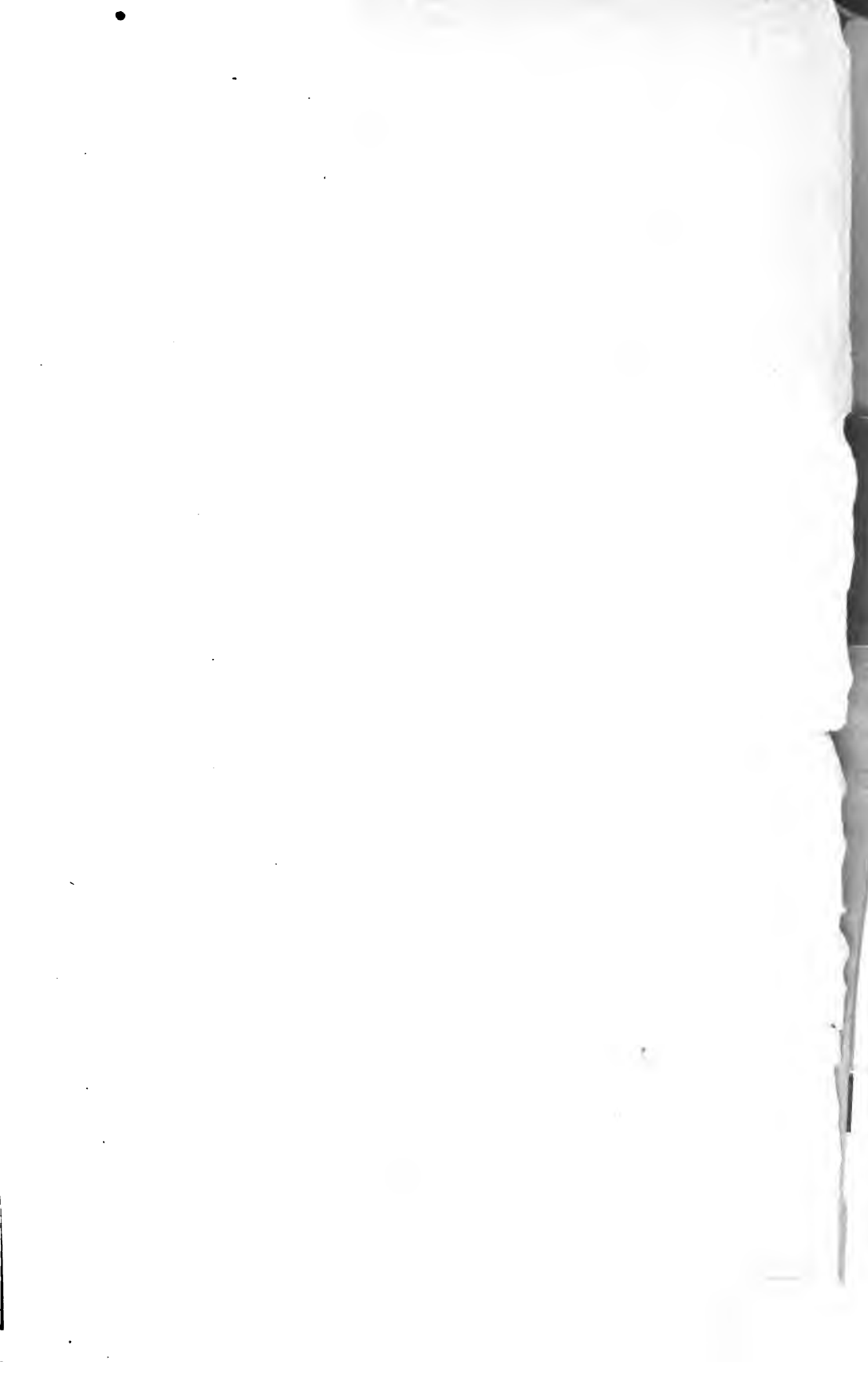
The many hundreds of private corporations formed within two years past, and the thousands formed theretofore, indicate a strong tendency among many people to incorporate and thus avoid individual responsibility. Some are formed for good purposes, many are purely speculative.

Our state is a very large one. The legislature meets but once in two years and then but for sixty days. The requirements of such a rapidly increasing population bring together men of such diverse minds, that it takes at least half the session to get acquainted with their different purposes, so legislation is, from force of circumstances, very slow. But let us lend all the aid we can in presenting such measures before the people as we see are needed, and hope the desired results will be reached after a while.









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